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**'The Application of International Environmental
Law for the Achievement of Environmentally
Sustainable Tourism'**

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Thesis submitted to the University of Nottingham
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Abstract

This thesis analyses the relationship between tourism and the natural environment and explores ways in which the imbalance between the two may be redressed, with a view to achieving environmentally sustainable tourism. This involves a critical examination of the legal framework currently in place, so as to ascertain the relative effectiveness of present-day structures and organisations. First, both the tourism industry and the natural environment – as conceptual elements – are explored, including a review of their historical and comparative development over recent years. This provides a context within which the thesis can be placed and establishes the foundations upon which subsequent analysis may be built. Next, tourism is assessed in the context of the international legal system, in an attempt to evaluate how the international community has responded to the tourism phenomenon and, moreover, how the international legal system might apply to the various participants within the tourism industry. This provides a platform from which to evaluate, in greater detail, the applicability of international environmental law to tourism, assessing the relevant law currently regulating marine and atmospheric pollution, as well as species protection and habitat preservation. The final part of the thesis recognises the present *ad hoc* approach of international environmental law towards tourism, and questions whether there might exist some specific obligation for sustainable tourism within the international legal system. In order to assess this theory, the principle of sustainable development is employed as the framework concept from which sustainable tourism emanates, and allows for those various concepts which collectively constitute sustainable development to be analysed in light of sustainable tourism obligations. It is concluded that there are two primary areas where efforts to address tourism-generated environmental degradation should be concentrated. First, the World Tourism Organisation must adopt a stronger leadership position in respect of sustainable tourism and develop its role as a centralised mechanism for coordinating international and regional efforts to regulate and manage tourism activities. Secondly, there must be a concerted effort to further promote and develop the principle of 'sustainable tourism', incorporating the legal rights and responsibilities embedded within this concept.

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List of Abbreviations

AJIL	<i>American Journal of International Law</i>
ASMA	Antarctic Specially Managed Areas
ASOC	Antarctic and Southern Ocean Coalition
ASPA	Antarctic Specially Protected Areas
ATCM	Antarctic Treaty Consultative Meeting
ATS	Antarctic Treaty System
BIICL	British Institute of International and Comparative Law
BYBIL	<i>British Yearbook of International Law</i>
CBD	Convention on Biological Diversity
CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources
CEC	North American Commission for Environmental Cooperation
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CSD	Commission on Sustainable Development
CTE	World Trade Organisation Committee on Trade and Environment
CUP	Cambridge University Press
EELR	<i>European Environmental Law Review</i>
EJIL	<i>European Journal of International Law</i>
FAO	Food and Agriculture Organisation of the United Nations
GATS	General Agreement on Trade in Services

GATT	General Agreement on Tariffs and Trade
GESAMP	Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection
GPA	Global Programme of Action for the Protection of the Marine Environment from Land-based Activities
IAATO	International Association of Antarctic Tour Operators
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organisation
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	<i>International and Comparative Law Quarterly</i>
ICSID	International Centre for Settlement of Investment Disputes
ICWRP	International Corporate Wetlands Restoration Partnership
IDA	International Development Association
IFC	International Finance Corporation
ILA	International Law Association
ILC	International Law Commission
ILM	<i>International Legal Materials</i>
IMO	International Maritime Organisation
IPCC	Intergovernmental Panel on Climate Change
IUCN	The World Conservation Union
IWC	International Whaling Commission

IYE	International Year of Ecotourism
JEL	<i>Journal of Environmental Law</i>
JIWLP	<i>Journal of International Wildlife Law and Policy</i>
MARPOL	International Convention for the Prevention of Pollution from Ships
MIGA	Multilateral Investment Guarantee Agency
MLR	<i>Modern Law Review</i>
MUP	Manchester University Press
NAAEC	North American Agreement on Environmental Cooperation
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic
OUP	Oxford University Press
PRTR	Pollutant Release and Transfer Register
RECIEL	<i>Review of European Community and International Environmental Law</i>
TOI	Tour Operators' Initiative for Sustainable Tourism Development
UN	United Nations
UNCCD	United Nations Convention to Combat Desertification
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNECE	United Nations Economic Commission for Europe

UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFCCC	United Nations Framework Convention on Climate Change
UNIOC	United Nations Intergovernmental Oceanographic Commission
UNTS	<i>United Nations Treaty Series</i>
WCED	World Commission on Environment and Development
WCPA	World Commission on Protected Areas
WHC	Convention concerning the Protection of the World Cultural and Natural Heritage
WHO	World Health Organisation
WMO	World Metrological Organisation
WSSD	World Summit on Sustainable Development
WTTC	World Travel and Tourism Council
WTO	World Tourism Organisation
WWF	World Wildlife Fund

Introduction

Tourists have been visiting Goa since the 1960s.¹ Located on the south west coast of India, the state of Goa encompasses more than 80 kilometres of sandy beaches with inland areas boasting huge expanses of paddy fields, coconut plantations, market villages, and the western Ghat mountains.² Environmental diversity, climate, and expansive beaches provide an obvious draw card for domestic and international tourists alike, which became evident during the sixties when backpackers travelled to Goa to experience the beautiful beaches, near perfect climate,³ inexpensive accommodation, and friendly locals.⁴ The particularly relaxed atmosphere of the people and natural surroundings made it a paradise for tourists, who 'were more or less able to adapt to the local way of life, eating local food and living in simple accommodation.'⁵ As a result, the impact on the environment from these tourists during the 1960s and 1970s was minimal.

¹ For an introduction to the political history of Goa see e.g. Q.Wright 'The Goa Incident' 56 *AJIL* (1962) 617; P.Merani 'The Goa Dispute' 14 *Journal of Public Law* (1965) 142; O.Salazar, 'Goa and the Indian Union: The Portuguese View' 34 *Foreign Affairs* (1955-1956) 418; and the ICJ decision in the *Right of Passage over Indian Territory* case (*Portugal v India*) 12 April 1960, ICJ Reports, at 6.

² For an overview of tourism in Goa see e.g. D.Wilson 'Paradoxes of Tourism in Goa' 24(1) *Annals of Tourism Research* (1996) 52; and the website <<http://www.anandaproject.org/mandrekarfamily/goamandre/goa.html>>.

³ In December and January the weather remains a settled 25-30°C, with cloudless skies and relatively low humidity. Note that whilst international tourists tend to restrict their visits to avoid the monsoon months (generally because the beaches are the primary attraction), domestic tourists visit Goa throughout the year. See K.Sawkar, L.Noronha, A.Mascarenhas, O.S.Chauhan and S.Saeed *Tourism and the Environment: Case Studies on Goa, India and the Maldives* (Washington: Economic Development Institute of the World Bank, 1998) 1.

⁴ Wilson, note 2, p. 54.

⁵ 'Tourism in Goa', see the website <<http://www.anandaproject.org/mandrekarfamily/tourismingoa.html>>.

As more people visited Goa and the reputation of the state's natural resources became increasingly widely known, tourist numbers began to escalate. By the middle of the 1980s charter flights were arriving in Goa and with them, 'a new breed of tourist who had money and demanded western amenities. This quickly caught the attention of foreign investors and tour companies, who wasted no time in building hotels, swimming pools and even golf courses to meet the tourists' growing expectations and demands.'⁶ The result was (now, at least) predictable.⁷ The marine environment suffered a loss of mangroves due to land reclamation for development, resulting in erosion and exposing coastal banks to storm surges. A steady decrease in fish catch and species occurred due to over-fishing, inappropriate catch methods, and a loss of spawning grounds. Land reclamation, the extraction of sand and the construction of jetties in areas of tourism development led to coastal erosion.⁸ Added to this were the impacts felt by the non-marine environment. Many of Goa's sand dunes were flattened as a result of intensive construction activities and, furthermore, tidal ingress (occurring from mining sand and sand dunes) has reduced the area of some beaches. Population numbers of endangered species – such as sea turtles – have decreased as a result of tourism development activities. Finally, recreation facilities and activities have been responsible for significant environmental impacts. Swimming pools and golf courses monopolise vital local water supplies, motor boats damage and pollute shallow coastal waters, beach accommodation lacks sufficient

⁶ *Ibid.*

⁷ For a discussion on the environmental impacts of tourism in Goa, see Sawkar, Noronha, Mascarenhas, Chauhan and Saeed, note 3, p. 8-13.

⁸ Sawkar, Noronha, Mascarenhas, Chauhan and Saeed, note 3, p. 8-10.

sewage facilities or refuse collection which together with beach litter, results in further pollution of coastal waters.⁹ Although tourism in Goa is concentrated predominately in coastal areas, transportation has been established in other areas (primarily in the form of airports and railway) which, together with increased motor vehicle use, have contributed to an increase in exhaust fumes and consequently, atmospheric pollution.

The reality of such extensive tourism development has two principal effects. First, the experience of tourists visiting Goa today is clearly different from previously, owing to the rapid (and mostly unregulated) development of the Goan tourism industry and the subsequent pollution and degradation of the local environment. As a result, tourists (and the tourism industry) frequently re-locate to new areas that have yet to undergo such an intensive development process – effectively seeking an environment similar to Goa in the 1960s, pre-mass tourism. The second effect tourism development has had on Goa is less easily rectified. Once the visitors have departed in search of their new ‘unspoilt’ holiday destination, Goa is left to contend with the environmental degradation and pollution created by the tourism industry.¹⁰ This is especially problematic for developing countries that lack the requisite financial and technological resources to facilitate environmental recovery, or indeed establish frameworks and infrastructure to prevent it occurring in the first place. However, perhaps of greatest concern is the fact that the story of Goa is in

⁹ Sawkar, Noronha, Mascarenhas, Chauhan and Saeed, note 3, p. 11-12.

¹⁰ There are obviously social and cultural ramifications of tourism development, however this thesis is restricted to the assessment of environmental impacts.

no way unique – such impacts from the tourism industry are replicated in numerous environments around the world.

So what are the options for Goa, and the plethora of other natural environments around the world that are affected by tourism development? And do there exist any institutional frameworks or infrastructures which are able to manage and regulate these activities, in order to prevent further degradation to the global natural environment? This thesis intends to analyse the process in accordance with which the imbalance can be redressed, with a view to achieving environmentally sustainable tourism.

In order to do this, the methodology of the thesis focuses on a critical analysis of the legal framework currently in place, so as to ascertain the relative effectiveness of present-day structures and organisations. First, both the tourism industry and the natural environment – as conceptual elements essential to the elaboration of the thesis – are explored, including a review of their historical and comparative development over recent years. This provides a context within which the thesis can be placed and establishes the foundations upon which subsequent analysis may be built. Next, tourism is assessed in the context of the international legal system, in an attempt to evaluate how the international community has responded to the tourism phenomenon and, moreover, how the international legal system might apply to the various participants within the tourism industry. This provides a platform from which to evaluate, in greater detail, the applicability of international environmental law to tourism, assessing the

relevant law currently regulating marine and atmospheric pollution, as well as species protection and habitat preservation. The final stage of the thesis methodology recognises the present *ad hoc* approach of international environmental law towards tourism, and questions whether there might exist some specific obligation for sustainable tourism within the international legal system. In order to assess this theory, the principle of sustainable development is employed as the framework concept from which sustainable tourism emanates, and allows for those various concepts which collectively constitute sustainable development to be analysed in light of sustainable tourism obligations. The thesis is set out by way of four substantive chapters, with a brief overall conclusion drawing together the main findings and preliminary conclusions identified in the preceding discussion. An overview of each individual chapter follows as a means of providing the reader with a guide to subsequent discussion.

Chapter One explores the concepts of tourism, the environment and the evolving idea of sustainable tourism, essentially formulating the boundaries for future discussion and consideration. The tourism industry is inherently dependent upon the natural environment for its continuing development and survival and, as such, the relationship between tourism and the environment is examined with a view to tracking their independent development in earlier decades – and convergence in more recent years. In addition to establishing definitions for tourism and the environment (so that the scope of discussion remains clear), the idea of sustainable tourism is shown to have emerged as a new and independent concept – drawing on

the principle of sustainable development – and therefore, is also explored as to its impact on the relationship between tourism and environmental protection. However, it becomes clear from this analysis that the principle of sustainable development in fact implies compromise – with environmental, development, social, and cultural interests all competing for priority. Whether an activity is environmentally sustainable, economically sustainable, or culturally sustainable implies very different standards. Such ambiguity surrounding the notion of ‘sustainability’ is problematic when attempting to quantify ‘what constitutes sustainability’. It is against this backdrop that the concept of ecotourism is mooted as a possible solution for representing ‘environmentally sustainable tourism’. Chapter One explores this supposition, but concludes that whilst ecotourism does offer a more environmentally-orientated approach, there are problems associated with the concept that prevent it from being adopted as a tourism-based conservation technique. This preliminary conceptual analysis of tourism and its relationship with the environment provides a framework for further discussion and exploration later in the thesis.

The second chapter places tourism in the context of the international legal system and questions how the industry has been addressed to date. As a prerequisite, it is important to establish that tourism regulation should indeed be approached from an international perspective (rather than solely by the adoption of national or regional standards and guidelines), so as to justify the methodology adopted. Following this, the various participants in the tourism industry are examined in order to determine how (or if)

international legal regulation might apply to them. Whilst it is widely accepted that international law applies directly to states, the application of international legal rights and obligations to other participants (such as individuals, non-governmental organisations, multinational enterprises and international organisations) has been less readily acknowledged. However, the recognition of international law as a legal process and the identification of the various roles each participant plays within that process, renders the adoption of the international legal system essential. Moreover, the diversity of participants within the tourism industry (such as individual tourists, multinational tour companies, international tourism organisations, and civil society in general), means that in order to be effective, an international regulatory approach which can extend beyond states to other participants must be adopted.

Tourism has been addressed by the international community via a number of global organisations, including the United Nations. Chapter Two also explores the different UN initiatives that acknowledge the relationship between tourism and the environment, and attempts to redress the current imbalance. Furthermore, the role of the World Tourism Organisation is examined, including its current agenda regarding the sustainable development of tourism and its future responsibilities and potential as a specialised agency of the UN. This further confirms tourism's place within the international legal system and highlights initiatives already established by the international community which apply to various participants within the industry.

Next, Chapter Three embarks on a critical analysis of the application of international environmental law to the tourism industry. Whilst there is not one single global agreement or convention regulating international tourism, much of the existing international environmental law can be applied to aspects of the tourism industry. This occurs either where general environmental provisions can be extended to tourism activities or, alternatively, where pre-existing treaties have adopted additional resolutions or recommendations, thereby extending the applicability of the agreement to the specific characteristics of the tourism industry. The regulation of environmental pollution can be seen to extend to tourism activities, especially in respect of marine pollution. The attraction of marine resources to tourists means that pollution to this environment is highly problematic. Thus, employing elements of international environmental law to address such problems offers one solution to tourism-generated marine pollution. Similarly, the high level of fossil fuel consumption required for the development of tourism infrastructure and the transportation of tourists has been acknowledged in international regulations pertaining to atmospheric pollution.

A second way in which international environmental law impacts on activities within the tourism industry is in respect of conserving biological diversity. Tourism clearly has the potential to have a detrimental impact on both species and habitat preservation by way of destroying habitat, consuming endangered species, or interfering with wildlife behaviour

patterns (which in turn, can be responsible for a whole host of problems, such as breeding and migration difficulties). Whilst much of the existing international environmental law demonstrates a very general applicability to tourism activities, the institutional bodies responsible for the implementation of such international agreements have played an important role. By acknowledging the environmental impact of tourism, institutional bodies are able to harness the collective will of states participating in an international agreement and subsequently, address the specific problem created by tourism.

The final chapter examines the concept of sustainable tourism and questions whether there exists a legal obligation for sustainable tourism within international law. Derived from the principle of sustainable development, 'sustainable tourism' is critically examined – within the framework of sustainable development – in order to determine what legal rights and obligations are attached to the tourism industry. The principle of sustainable development is identified as possessing substantive characteristics which shape and define the principle (equitable utilisation, sustainable use, and integration), supplementary principles which contribute to the achievement of the objective (principle of precaution, polluter-pays principle, cooperation), and procedural techniques responsible for implementation (environmental impact assessment and public participation). The identification of these individual concepts (which collectively constitute sustainable development) makes the principle more tangible and accessible in the broader context of

international law. If the principle of sustainable development has achieved recognition within international law and the individual concepts that constitute sustainable development can be identified, then it naturally follows that the principle of sustainable tourism (which is based on sustainable development and thus, can arguably be attributed the same conceptual structure) may be legitimised by recognising the presence of each of the contributing legal concepts in the context of the tourism industry. Whilst it is acknowledged that such rationale does not establish an unequivocal legal obligation in respect of sustainable tourism, the identification of the specific concepts that are required in order to satisfy the requirement for sustainable tourism goes some way to proving an emerging international recognition of the principle.

It is the intention of this thesis to critically examine the way in which the international legal system has responded to global tourism issues, primarily that of environmental degradation. Moreover, an analysis of the current status and future potential of the principle of sustainable tourism within international law contemplates whether there exists an underlying obligation for sustainable tourism, and what the implication for such recognition might involve. In this way, places such as Goa might be able to avoid the environmental damage and pollution sustained as a result of tourism and, looking forward, achieve the ultimate objective of environmental sustainability.

1.

Tourism, the Environment, and the Evolving Notion of 'Sustainable Tourism'

Tourism has an inescapable relationship with the natural environment. This chapter explores the development of the tourism industry and environmental concern, mapping their convergence during the later part of the twentieth century. Tourism can be identified both as a concept, as well as a global industry and, as such, is explored in both of these contexts in order to reach a definition on which subsequent discussions can be based. The emergence of the 'sustainable tourism' concept reflects a further expansion of the tourism industry. Originating from the principle of sustainable development, sustainable tourism provides a conservation technique (as well as another category of tourism), whereby the underlying principles of sustainable development are applied to tourism activities. However, sustainable tourism often involves the balancing of different priorities – environmental, economic and social – resulting in environmental concerns competing against other factors within the tourism industry. Finally, the more recent emergence of ecotourism is explored as a possible concept for promoting environmentally sustainable tourism – that is, sustainable tourism where environmental concerns are afforded priority. However, as will become apparent, there are problems with attributing such significance to the ecotourism concept and to-date, this has received mixed response from participants within the international tourism

industry. Thus, the core objectives of this chapter include the introduction and explanation of the various tourism concepts, and the identification of the threat to the international environment posed by the tourism industry. These conclusions will establish the foundations for future discussion and debate throughout the remainder of the thesis.

1.1 Tourism: A Concept and an Industry

The numerous activities that collectively constitute 'tourism' are now regarded as the world's largest industry.¹ Transportation, a fundamental pre-condition of tourism, initially moderated the development of the travel industry during the early part of the twentieth century. However, the increasing mobility of people by virtue of railways, private motor cars, coaches, and cruise ships instilled an excitement and eagerness to explore previously impenetrable places. Enthusiasm for this newly discovered ability to travel was epitomised by Scottish novelist Kenneth Grahame in 1908, who wrote

'Camps, villages, towns, cities! Here to-day, up and off to somewhere else to-morrow! Travel, change, interest, excitement! The whole world before you, and a horizon that's always changing!'²

¹ The term 'tourism' may include transportation services, accommodation facilities, travel agents, tour operators, tourist attractions, eating facilities, and merchandise production. Collectively, these activities constitute tourism and represent an international industry. See United Nations Economic and Social Council *Report of the Secretary-General on Sustainable Development of Tourism* UN Doc. E/CN.17/2001/PC/21 (2 March 2001) 2. For statistical information on the international tourism industry, see World Tourism Organisation *Tourism Highlights 2003* (Madrid: World Tourism Organisation, 2003).

² K.Grahame *The Wind in the Willows* (London: Methuen & Co, 1908) 32.

Early forms of travel were not generally associated with the leisure and recreation activities largely synonymous with modern-day tourism, but instead related to pilgrimages, trade and business travel.³ The eighteenth century saw the rise of the aristocratic traveller who sought education and the fulfilment of official duties; however, the majority of the population lived as part of a community with neither the means, nor purpose, to travel further than their local district.⁴ The industrial revolution of the late eighteenth and early nineteenth centuries precipitated the next phase of tourism development, creating an increase in transportation options and a growing wealth among communities. Furthermore, early trends of travel by individuals consumed with purpose and duty was transcended by the phenomenon of group excursions, exemplified in 1841 when Thomas Cook conceived the idea to 'engag[e] a special train to carry friends of temperance from Leicester to Loughborough and back to attend a quarterly delegate meeting'.⁵ Such organised outings became increasingly frequent and more complex, encompassing greater numbers of tourists and more varied destinations – 'no longer the preserve of peripatetic aristocrats and eccentrics, tourism was now an industry'.⁶

Following the rapid expansion of tourism-related activities, there emerged a need to conclude a definition for tourism, thereby establishing boundaries

³ For an overview of the history of tourism development see e.g. A.Burkart and S.Medlik *Tourism: Past, Present and Future* (London: Heinemann, 1981 2nd edition.); L.Turner and J.Ash *The Golden Hordes: International Tourism and the Pleasure Periphery* (London: Constable & Co, 1975).

⁴ Burkart and Medlik, note 3, p. 4.

⁵ Turner and Ash, note 3, p. 51.

for discussion on the topic. Traditionally approached from economic, sociological or geographical perspectives,⁷ many of the early discussions regarding the conceptualisation of tourism were motivated by individuals and organisations seeking a method of gauging and attributing economic value to the industry. Thus, the *raison d'être* for defining the concept has been conceived out of an incentive to quantify the value associated with tourist activities.⁸ The terms 'tourist', 'visitor' and 'excursionist' were initially defined 'for statistical purposes' as a joint effort by the United Nations Economic and Social Council and the International Union of Official Travel Organisations,⁹ as a result of the 1963 United Nations Conference on International Travel and Tourism (UNCITT).¹⁰ From these preliminary interpretations, a contemporary definition has subsequently evolved and the World Tourism Organisation (WTO)¹¹ now declares 'tourism' to be

'the activities of persons travelling to and staying in places outside their usual environment for not more than one consecutive year for leisure, business and other purposes

⁶ Turner and Ash, note 3, p. 59.

⁷ E.g. B.Boniface and C.Cooper *The Geography of Tourism and Travel* (Oxford: Butterworth-Heinemann, 1994 2nd edition); A.Mathieson and G.Wall *Tourism: Economic, Physical and Social Impacts* (London: Longman, 1982); J.Urry *The Tourist Gaze: Leisure and Travel in Contemporary Societies* (London: Sage, 2001 2nd edition).

⁸ Basic tourism concepts are explained for the purpose of economic analysis in A.Bull *The Economics of Travel and Tourism* (Melbourne: Longman, 1995 2nd edition).

⁹ The International Union of Official Travel Organisations was the predecessor to the present-day World Tourism Organisation. For a discussion on the World Tourism Organisation, see Chapter 2 (2.4).

¹⁰ United Nations *Recommendations on International Travel and Tourism* UN Doc. E/CONF. 47/18 (1964) 5. 'Visitors' were either 'tourists' (temporary visitors to a country staying at least 24 hours, for the purpose of leisure or business), or 'excursionists' (temporary visitors staying in a country less than 24 hours, for the same purpose, but excluding transit passengers).

¹¹ The World Tourism Organisation shares the same abbreviated title as the World Trade Organisation. For the purpose of this thesis, WTO shall refer to the World Tourism Organisation.

not related to the exercise of an activity remunerated from within the place visited'.¹²

Whilst there is no universally accepted definition of 'tourism', the WTO definition remains the most frequently cited and extensively applied interpretation of the term.¹³ This definition remains largely unchanged from the early prototypes constructed 40 years earlier at the UNCITT.¹⁴ Thus, modern-day interpretations of the tourism industry remain founded in a definition established primarily for the purpose of statistical economic analysis. Whilst the term has subsequently been adopted and applied in various sociological, geographical and anthropological contexts, the essence of the tourism definition has remained the same, suggesting that the WTO interpretation is sufficiently adaptable to be employed by various disciplines. However, it is important to note that whilst the tourism phenomenon has become increasingly holistic in recent years with the proliferation of cultural, developmental and environmental issues,¹⁵ a strict interpretation of the tourism definition still reflects a fundamentally commercially orientated instrument. Accordingly, in addressing the

¹² World Tourism Organisation, 2000. See the WTO website <http://www.world-tourism.org/statistics/basic_references/index-en.htm>.

¹³ See e.g. Bull, note 8, p. 2; Mathieson and Wall, note 7, p. 10-12; S.Witt, M.Brooke and P.Buckley *The Management of International Tourism* (London: Routledge, 1992) 3; E.Cater and B.Goodall 'Must Tourism Destroy its Resource Base?' in A.Mannion and S.Bowlby (eds.) *Environmental Issues in the 1990s* (Chichester: John Wiley & Sons, 1992) 309.

¹⁴ For an etymological analysis of the tourism concept, see; W.Theobald (ed.) *Global Tourism: The Next Decade* (Oxford: Butterworth-Heinemann, 1994) 3-19.

¹⁵ Various organisations have evolved, or diverged to address tourism and its impact on cultural, environmental and developmental issues, e.g. The International Ecotourism Society <<http://www.ecotourism.org/>>; Tourism Concern <<http://www.tourismconcern.org.uk/>>; UNEP's Tourism Programme <<http://www.uneptie.org/pc/tourism/sust-tourism/home.htm>>; Third World Network <<http://www.twinside.org.sg/>>; and the United Nations Commission on Sustainable Development <<http://www.un.org/esa/sustdev/index.html>>.

plethora of issues associated with tourism, the context in which matters such as environmental protection are analysed remains founded in an economics-based definition.

1.2 The Developing Tourism Industry and the Natural Environment

From the outset, tourist destinations have been chosen for reasons based primarily on the natural environment. Many European tourists in the early eighteenth century holidayed at French Riviera and Mediterranean resorts, being drawn to the warm climate and abundant beaches offered by these regions.¹⁶ Similarly, when modern-day tourists decide on a holiday destination, the natural environment acts as the predominant allurement – the primary resources of the destination (such as natural scenery or wildlife), coupled with favourable climatic conditions, provide the main ‘attractive power’ of the destination.¹⁷ Accordingly, the continuing success and future development of the tourism industry is inextricably dependent upon the sustainability of the environment’s natural resources.¹⁸

¹⁶ Turner and Ash, note 3, p. 72-74.

¹⁷ E.Cater and B.Goodall ‘Must Tourism Destroy its Resource Base?’ in Mannion and Bowlby (eds.) *Environmental Issues in the 1990s* (Chichester: John Wiley & Sons, 1992) 312. Note that cultural heritage and man-made features may also create a further attraction for tourists, for example, the Great Wall of China; the Egyptian Pyramids; Vatican City; the Acropolis in Athens; and India’s Taj Mahal.

¹⁸ See e.g. A.Holden ‘Investigating Trekkers’ Attitudes to the Environment of Annapurna, Nepal’ 24 *Tourism Management* (2003) 341.

1.2.1 Environment and Tourism: The Relationship

The relationship between tourism and the natural environment is a complex one.¹⁹ Tourism is fundamentally dependent upon the natural environment for its continuing survival, yet, at the same time, the continuous development of the tourism industry often consumes and degrades the very environment upon which it depends.²⁰ Three different relationships between the tourism industry and environmental concern have been identified and cited by commentators – namely coexistence, conflict, and symbiosis.²¹

During the early stages of the relationship, tourism and the environment simply *coexist*, both operating largely independently of each other and having minimal interaction. However, as either tourism or environmental priorities develop and expand, the relationship is forced to enter a new association, that of either conflict, or symbiosis. *Conflict* generally arises between the two elements when tourism expands rapidly, consuming or degrading the natural environment and encroaching on local communities. In such a situation, conservationists typically become frustrated with the economy-driven industry and attempt to impose as many restrictions and

¹⁹ For a recent overview of the international tourism industry and its global environmental impacts see, L.Mastny 'Redirecting International Tourism' in Worldwatch Institute *State of the World 2002: Progress Towards a Sustainable Society* (London: Earthscan, 2002).

²⁰ See generally A.Holden 'In Need of New Environmental Ethics for Tourism' 30(1) *Annals of Tourism Research* (2003) 94; H.Briassoulis and J.van der Straaten *Tourism and the Environment: Regional, Economic and Policy Issues* (London: Kluwer, 2000 2nd edition); Mannion and Bowlby, note 13. In the European context see e.g. A.Marx 'Towards Sustainability? The Case of Tourism and the EU' 6(6) *EELR* (1997) 181; K.Woodward 'Loving the Environment to Death: Can Law Protect the Environment from the Leisure Threat?' 5(5) *EELR* (1996) 148.

²¹ G.Budowski 'Tourism and Environmental Conservation: Conflict, Coexistence, or Symbiosis?' 3(1) *Environmental Conservation* (1976) 27. See also Mathieson and Wall, note 7, p. 94.

stumbling blocks as possible in order to hinder the further development of tourist activities.

The alternative option is a state of *symbiosis* where both the tourism industry and the environment exist in a mutually beneficial relationship. This symbiotic association provides potential benefits for both elements, as the tourism industry sustainably utilises natural resources (preferably in a non-consumptive manner such as nature and wildlife viewing) whilst simultaneously generating revenue which can be re-directed towards the protection and restoration of the natural environment. However, the unfortunate reality of the situation is that the relationship more often declines into one of conflict.²²

Early phases of tourism development predominately occurred before the international rise of environmental concern, suggesting that ignorance on the part of developers may have initially been to blame for the growing animosity between tourism and environment advocates.²³ Nonetheless, this has now changed with the widespread acknowledgement that unrestricted tourism development may result in significant environmental degradation.²⁴ Accordingly, the impetus behind the continuing conflict has largely been the prioritisation of economic over environmental interests.

²² Budowski, note 21, p. 27.

²³ Tourism development began to proliferate at the turn of the 20th century, whilst international environmental concern did not really take effect until the later part of that century. See *infra* 1.2.2 for a more detailed discussion on this point.

²⁴ 'There is now a recognition that uncontrolled growth in tourism aiming at short-term benefits often results in negative impacts, harming the environment and societies, and destroying the very basis on which tourism is built and thrives', UN Economic and Social Council *Report of the Secretary-General on Sustainable Development of Tourism* UN

In determining the potential impact of tourism activities on the environment, it has been suggested that the particular evolutionary stages of tourism development often correlate with the level of damage sustained by that local environment.²⁵ In areas where relatively few persons travel, environmental impact has a tendency to remain low, as such visitors are often more inclined to accept local conditions and integrate into the surroundings.²⁶ Conversely, when large numbers of tourists visit an area on chartered or package-type excursions, the environmental impacts are comparatively greater as the disposition of this type of tourist is often to expect comfortable Western amenities, placing greater pressure on local communities and natural resources.²⁷ Such environmental damage created by the tourism industry can be identified as occurring on two levels.²⁸ First, the *primary natural resource* responsible for attracting tourists to the area is highly susceptible to degradation from an influx of people utilising and consuming the entity. This can be demonstrated with the example of a beach which, when inundated with tourists, risks increased degradation from litter, pollution from motor boats, and damage to the local

Doc. E/CN.17/2001/PC/21 (2 March 2001) 2. See also S.Gossling 'Global Environmental Consequences of Tourism' 12 *Global Environmental Change* (2002) 283.

²⁵ R.Prosser 'The Ethics of Tourism' in D.Cooper and J.Palmer (eds.) *The Environment in Question: Ethics and Global Issues* (London: Routledge, 1992) 41.

²⁶ Perhaps the most obvious example of this stage of tourism development would be outdoor hiking/wilderness camping type activities where tourists are more likely to leave less of an environmental impact than popular resort-based travel.

²⁷ For example, a tourist staying in a hotel uses on average one-third more water than a local inhabitant, while the annual consumption of a golf course is equivalent to that of a city of 12,000 inhabitants. For a more detailed discussion on this point, see World Wildlife Fund *Freshwater and Tourism in the Mediterranean* (Rome: WWF, 2004).

²⁸ Cater and Goodall, note 17, p. 312.

biodiversity and habitats from over-fishing and sand dune erosion.²⁹ The other level on which tourism potentially impacts on the environment relates to the plethora of *secondary resources* that are required in order to facilitate a tourist's visit to the primary resource. Accordingly, to enable people to visit a beach, there must be transportation services, accommodation, eating and waste disposal facilities as a minimum, with the potential for additional entertainment and shopping facilities, along with add-on tourist excursions and activities. These secondary resources impose a considerable threat to the environment, as the development of such facilities is often located in areas harbouring sensitive ecosystems such as coastlines, mountains, and historic environments.

Furthermore, the direct consequences of tourism development on the environment's resources are also twofold. First, the *quantity* of available natural resources becomes limited, restricting further development, and secondly, the *quality* of the resources depreciates, resulting in unfavourable effects on tourism itself.³⁰ The antagonistic relationship between tourism and the natural environment can be exemplified by numerous illustrations – a fundamental one being in relation to water. The availability of clean and accessible drinking water in many parts of the world represents a significant challenge for local communities – and, when the requirements

²⁹ Similarly, Peru's Machu Picchu has experienced significant environmental degradation over recent years. More than 1,500 tourists walk the 500 year old, 40 mile Inca trail every day, eroding the trail's stone staircases and granite terraces, while up to 2,000 people visit the Machu Picchu citadel each day, with visitor numbers growing at six percent per annum. See R. Emmott *Tourism Boom Threatens Peru's Machu Picchu* World Environment News (28 November 2003) available at the website <<http://www.planetark.com/avantgo/dailynewsstory.cfm?newsid=22960>>.

³⁰ H. Briassoulis and J. van der Straaten (eds.) *Tourism and the Environment: Regional, Economic, Cultural and Policy Issues* (London: Kluwer, 2000 2nd edition) 5.

of visiting tourists are superimposed the issue becomes even more problematic.³¹ Moreover, water resources (such as the Mediterranean Sea³²) often become a depository for local sewage, along with municipal and industrial waste, effectively destroying the very characteristics of the primary resource that originally enticed tourists to the area.³³

Nevertheless, in some cases tourism can offer conservation benefits by working in harmony with environmental protection. This is illustrated by the protection of wildlife resources for the purpose of attracting nature-based tourist activities. National parks in southern Africa strive to ensure the conservation of wildlife responsible for attracting tourists (and tourist revenue) into the region. As a result, a proportion of this revenue is re-directed back into conservation programmes to ensure the sustainability of the natural resources, and moreover, the sustainability of the tourist revenue.³⁴ Similarly, money generated by tourism has also been used to rehabilitate historic sites and transform derelict areas into new tourist facilities.³⁵ However, this symbiotic relationship between tourism and the environment is fundamentally reliant upon the ability of natural resources

³¹ A long-term drought in North Africa (during 1994-1996) meant that the town of Tangier, in Morocco, suffered from a severe freshwater shortage. During this time, water supply to tourist facilities had priority over the needs of the local population. See WWF, note 27, p. 14.

³² E. Shirbon 'Tourist Hordes Damage Mediterranean Freshwater, Says WWF' *Environmental News Network*, 16 July 2004 at <http://www.enn.com/news/2004-07-16/s_25911.asp>.

³³ The Mediterranean Sea is the topic of a number of treaties aimed at regulating the pollution of the marine environment. See e.g. Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean; the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities; the Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean. See the UNEP Regional Seas website <<http://www.unep.ch/seas/rshome.html>>.

³⁴ Mathieson and Wall, note 7, p. 99.

³⁵ Mathieson and Wall, note 7, p. 96.

to attract tourist revenue, which may then be used to facilitate conservation. Whilst this relationship offers many obvious advantages for the protection of wildlife and the natural environment, it is limited to natural resources judged by tourists to be worthy of preservation.³⁶ Thus, a distinctly anthropocentric attitude is adopted, as elements of the environment accorded protection by tourism revenue are restricted to resources deemed to be of value to humanity, usually either for aesthetic or practical reasons, with the consequent neglect of many other integral aspects of the natural environment. As such, tourism may be a useful stimulus for conservation, but it should be utilised in conjunction with additional measures to ensure all aspects of the ecosystem are accorded sufficient protection.³⁷

When determining the nature of the tourism-environment relationship, another variable worthy of consideration is the absorption threshold (or carrying capacity) of a particular environment.³⁸ There are a number of business and anthropological models utilised for assessing carrying capacity, each with the potential to conclude a different threshold level depending upon what emphasis is applied.³⁹ The impact of tourism on the physical environment can be measured and assessed by the evaluation of

³⁶ It is much easier to generate revenue via tourism for the conservation of aesthetically attractive ecosystems and species (such as beaches, lagoons, mountains, giant pandas, cetaceans, big cats etc), compared to the less glamorous elements of the natural environment (for example wetlands, insects, predator species etc).

³⁷ For a discussion on the various justifications and techniques for acceding environmental protection, see e.g. A.Gillespie *International Environmental Law, Policy and Ethics* (Oxford: Clarendon Press, 1997).

³⁸ For an overview of the concept of 'carrying capacity' see e.g. P.Williams and A.Gill 'Tourism Carrying Capacity Management Issues' in W.Theobald (ed.) *Global Tourism: The Next Decade* (Oxford: Butterworth-Heinemann, 1994).

³⁹ Briassoulis and van der Straaten, note 30, p. 91-105.

three factors.⁴⁰ First, 'physical capacity' refers to the number of tourists a resource can logistically cope with. Secondly, 'environmental' capacity determines the number of tourists which an environment can endure without registering a negative impact on the allurement to tourists. Finally, the 'ecological' capacity is the threshold at which the natural environment can absorb tourists until an ecological decline occurs. Whilst each of these assessment criteria have differing priorities which can subsequently result in varying interpretations of the absorption threshold, the essence of the theory is ultimately achieving an acceptable level of sustainability.

1.2.2 The Convergence of Environmental Concern with the Developing Tourism Industry

To fully appreciate the relationship between tourism and the environment, the tourism industry should be viewed in light of the emergence of international environmental concern. As the international development and proliferation of these two elements occurred at fundamentally different times during the last century, the reconciliation of tourism and environmental developments contribute to a more comprehensive appreciation of the relationship.

The evolution of environmental concern and regulation has emerged comparatively recently, motivated by an increase in industrialisation and

⁴⁰ Witt, Brook and Buckley, note 13, p. 17.

development, as well as environmental empathy and management.⁴¹ Initial attempts at environmental conservation were mostly motivated by self-interest and the recognition that natural resources were in fact limited.⁴² Early attempts at managing natural resources had limited success, but, nevertheless, established the foundations for environmental regulation which continued to develop in subsequent years.⁴³ Furthermore, the acknowledgement of environmental damage from pollution – associated with ever-increasing levels of industrialisation – highlighted the fact that international action was required.⁴⁴ This can be demonstrated by examining the years preceding the Second World War which represented an emergence period for environmental concern. However, most ‘environmental’ orientated agreements and disputes during this period remain primarily focussed on the control and utilisation of resources. In addition, the formation of the United Nations in 1945 established a

⁴¹ P.Sands *Principles of International Environmental Law* (Cambridge: CUP, 2003 2nd edition) 25.

⁴² Examples of early attempts at regulating natural resources include the 1900 Convention Destinée à Assurer la Conservation des Diverses Espèces Animales Vivant à l’État Sauvage en Afrique qui sont Utiles à l’Homme ou Inoffensive (19 May 1900; B.Ruster and B.Simma *International Protection of the Environment: Treaties and Related Documents vol.4* at p.1607), established to ensure the conservation of specific African animals which were useful or inoffensive to humankind, and the similarly themed 1902 Convention to Protect Birds Useful to Agriculture (19 March 1902; B.Ruster and B.Simma *International Protection of the Environment: Treaties and Related Documents vol.4* at p.1615). Furthermore, in response to the rapid development of commercial whaling which had emerged since the eleventh century, a Convention for the Regulation of Whaling was concluded in 1931 aimed at controlling the utilisation of these natural resources in order to ensure the sustainability of the whaling industry. All of these Conventions have in effect been superseded by later instruments.

⁴³ For example, the 1931 Whaling Convention (24 September 1931; 155 *League of Nations Treaty Series* 349) proved to be of limited value due to a notable lack of ratification by major whaling states, resulting in the continuing depletion of whale stocks. For further discussion on this point, see S.Lyster *International Wildlife Law: An Analysis of the International Treaties Concerned with the Conservation of Wildlife* (Cambridge: Grotius, 1985) ch. 2.

⁴⁴ E.g. *Trail Smelter Arbitration (United States v Canada)* 16 April 1938 (35 *AJIL* (1941) 684) in which the United States took action against Canada for damage caused by a smelter located in Canadian territory. Notably, the Tribunal restricted the award of

framework, which, although initially lacking an environmental agenda, would play a significant role with regard to environmental protection at a later date.⁴⁵ Furthermore, this period saw the rise of an ethical philosophy centred on humanity's relationship to, and exploitation of, the natural environment, thereby adding further legitimacy to proponents of environmental concern.⁴⁶

In 1972 the United Nations convened the seminal Stockholm conference to discuss issues relating to the environment in order 'to inspire and guide the peoples of the world in the preservation and enhancement of the human environment'.⁴⁷ The resulting 'Stockholm Declaration' has come to represent the essential environmental attitude of the era. Following the Conference a number of global treaties were concluded, significantly expanding the body of international environmental law whilst simultaneously raising the awareness of conservation values.⁴⁸ The follow-up United Nations Conference on Environment and Development in 1992 (the Rio Conference) again promoted issues relating to environmental protection, in particular those regarding the concept of sustainable

compensation to property and neglected to deal with claims for damage to the natural environment.

⁴⁵ For a more detailed discussion on the relevant work of the United Nations, see *infra*, Chapter 2 (2.3).

⁴⁶ See e.g. A. Leopold *A Sand County Almanac* (Oxford: OUP, 1949); R. Carson *Silent Spring* (Boston: Houghton Mifflin, 1962).

⁴⁷ Preamble, 1972 Declaration of the UN Conference on the Human Environment (Stockholm Declaration).

⁴⁸ International agreements concluded during the 1970s which still have an important place in current environmental protection include the: 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat (996 UNTS 245); 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (11 ILM 1358); 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (993 UNTS 243); 1973 International Convention for the Prevention of Pollution by Ships (12 ILM 1319); 1979 Convention on the Conservation of European

development.⁴⁹ Again, a number of international environmental agreements were concluded in the wake of this Conference, illustrating the distinct emphasis now being placed on the sustainability of resources, with attempts to shift from the traditional utilitarian outlook to an increasing ecocentric approach to environmental protection.⁵⁰ Finally, 2002 saw the convening of the Johannesburg World Summit on Sustainable Development, the third global UN conference convened to evaluate the progress made in respect of international environmental concern.⁵¹

In reconciling the development of, on the one hand, environmental concern and regulation with, on the other, the tourism industry, it is apparent that the extent of the relationship between the two concepts has only recently been validated. Prior to the early 1970s, the need for conservation was recognised at an international level primarily by way of indirect endorsement via instruments established with diverse objectives. However, following the Stockholm conference many agreements were adopted for the specific purpose of environmental protection, albeit often largely motivated by self-interest and the preservation of natural resources. Conversely, tourism development accelerated in the early twentieth century, emerging simultaneously with transportation developments. The popularisation of tourism received additional momentum with the

Wildlife and Natural Habitats (United Kingdom Treaty Series 56 (1982)); 1979 Convention on Long-Range Transboundary Air Pollution (18 ILM 1442).

⁴⁹ The concept of sustainable development is discussed in greater detail *infra* at 1.3.1.

⁵⁰ The 1992 Rio Declaration on Environment and Development and the Agenda 21 action plan were both adopted at the Rio Conference, while the United Nations Framework Convention on Climate Change, the Convention on Biological Diversity, and the Statement of Forest Principles were opened for signature.

⁵¹ For a discussion on the outcomes of the 2002 World Summit, see *infra* at 1.3.1.

increased availability of civil aviation following the Second World War, significantly increasing the 'pleasure periphery'.⁵² Thus, the tourism industry experienced an advanced period of largely unrestricted growth and market penetration before environmental concern became internationally prominent, let alone adapted to address the specific characteristics of the tourism phenomenon.

1.3 The Emergence of Sustainable Tourism

Since its inception towards the beginning of the 1900s, the tourism industry has continued to flourish and diversify in response to the technological developments and the varying trends and priorities of tourists, industries, and the environmental climate. The emergence of the 'sustainable tourism' concept signified an important development in the relationship between the natural environment and the tourism industry. Whilst the independent development of the tourism industry and environmental concern have been outlined above, the emergence of sustainable tourism in some ways represents the merger of these two elements. Building on the principle of sustainable development, 'sustainable tourism' has now become an important international concept in its own right.

⁵² Turner and Ash, note 3, p. 93.

1.3.1 The Principle of Sustainable Development as the Foundation for Sustainable Tourism

In order to appreciate the role of sustainable tourism, the principle of sustainable development first warrants explanation so as to establish the origins and priorities underlying the concept.⁵³ Although the origins of sustainable development are most often attributed to the 1987 Report of the World Commission on Environment and Development,⁵⁴ the essence of the concept can in fact be recognised in earlier management techniques of natural resources.⁵⁵

The 1972 Conference on the Human Environment and the resulting Stockholm Declaration made a fundamental contribution to the development of international environmental awareness and regulation. Whilst the Declaration neglects to make any express reference to

⁵³ An outline of the evolution of sustainable development and a description of the basic concept are undertaken here. A comprehensive exploration of the various principles constituting sustainable development, and their impact on tourism can be found in Chapter Four. For a discussion on sustainable development and international law, see e.g. A.Boyle and D.Freestone (eds.) *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: OUP, 1999); U.Beyerlin 'The Concept of Sustainable Development' in R.Wolfrum (ed.) *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?* (Berlin: Springer, 1996); W.Lang *Sustainable Development and International Law* (London: Graham & Trotman, 1995); P.Sands 'International Law in the Field of Sustainable Development' 65 *British Yearbook of International Law* (1994) 303.

⁵⁴ WCED *Our Common Future* (Oxford: OUP, 1987).

⁵⁵ E.g. the 1958 Convention on Fishing and the Conservation of the Living Resources of the Sea (559 UNTS 285) refers to the maintenance of a 'maximum sustainable yield', and the 1972 Convention for the Conservation of Antarctic Seals (11 ILM 251) promulgates the regulation of harvesting 'so as not to exceed the levels of the optimum sustainable yield'. Such agreements recognise the potential exhaustibility of various natural resources and advocate a sustainability approach to ensure a future capacity for their harvesting. However, this approach has been considered to be fundamentally flawed as a conservation technique due to the calculation of the harvesting thresholds being restricted to scientific population data, omitting factors relating to ecological interaction, environmental disturbance, or economic objectives. For a discussion on early conservation techniques, see P.Birnie and A.Boyle *International Law and the Environment* (Oxford: OUP, 2002 2nd edition) 545-556.

sustainable development, the underlying principles and the essence of the concept are arguably present. Notably, the Declaration recognises the need to safeguard natural resources for the benefit of present and future generations,⁵⁶ the fact that non-renewable resources are in danger of future exhaustion,⁵⁷ and the importance of both economic and social development in ensuring an environment necessary to improve the quality of life.⁵⁸ Thus, whilst there remains no explicit recognition of sustainable development *per se*, both of the contributing factors (that is, development and sustainability) are highlighted as fundamental concerns in the preservation and enhancement of the human environment.

The conclusion of the World Conservation Strategy in 1980 provides a further link to the concept of sustainable development by emphasising the relationship between conservation and development.⁵⁹ The Strategy advocates the importance of genetic diversity and the preservation of essential life-support systems, whilst calling for any use of such resources to be sustainable. However, despite proffering a clear stance and direction with respect to sustainable development, the conclusion of the document by non-governmental and inter-governmental organisations,⁶⁰ means the Strategy potentially lacks the influence more often attributed to instruments concluded directly by states.

⁵⁶ Stockholm Declaration, note 47, principle 2..

⁵⁷ Stockholm Declaration, note 47, principle 5.

⁵⁸ Stockholm Declaration, note 47, principle 8.

⁵⁹ International Union for Conservation of Nature and Natural Resources (IUCN) *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (Gland: IUCN, 1980).

⁶⁰ The World Conservation Strategy was prepared by the World Conservation Union (now the IUCN), UNEP, the WWF, UNESCO, and FAO.

The case for sustainability was provided with further impetus only a few years later with the adoption by the United Nations General Assembly of the World Charter for Nature (WCN).⁶¹ The WCN presents an innovative approach to nature conservation by urging environmental protection for the benefit of nature itself – rather than exclusively for its relative value to humanity. The explicit recognition of the idea that ‘mankind is part of nature’ and depends upon the environment’s natural systems for the ‘supply of energy and nutrients’ is also a novel concept found within the Charter.⁶² This validation of the dependent relationship between humanity and the natural environment consequently prompted the inclusion of a number of principles recognising the importance of sustainability. Notably, ecosystems and organisms utilised by man should be managed in order to achieve and maintain ‘optimum sustainable productivity’, but not to such extent as to endanger co-existing ecosystems or species.⁶³ The Charter advocates social and economic development activities but states that ‘due account should be taken of the fact that ‘the conservation of nature is an integral part of those activities’.⁶⁴ Once again, despite the lack of any explicit reference to ‘sustainable development’, the WCN contributes to the advancement of the concept by highlighting the interdependence between humanity and the natural environment and furthermore, supports the inclusion of ecological factors in the assessment of sustainability.

⁶¹ World Charter for Nature, UNGA Res. 37/7, 28 October 1982.

⁶² World Charter for Nature, note 61, preamble.

⁶³ World Charter for Nature, note 61, paragraph 1(4). Also, see Principle 10 with respect to living and non-renewable resources.

Sustainable development finally came of age and emerged as a concept in its own right in 1987 with the publication of a report by the World Commission on Environment and Development (WCED), commonly referred to as the 'Brundtland Report'.⁶⁵ The WCED effectively took stock of the current state of human development and the natural environment and recommended the adoption of 'sustainable development' as a way forward, defining the idea as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.⁶⁶ In reaching this interpretation, the WCED concludes sustainable development to comprise two parts, namely (i) the concept of 'needs' (particularly the essential needs of the poor) to which overriding priority should be given; and (ii) the idea of limitations imposed by the state of technology and social organisation on the environment's ability to meet present and future needs.⁶⁷

The Brundtland Report recognises the importance of development, especially to achieve basic needs for the poor, and the concurrent importance of natural resource utilisation in achieving such a level of development. Accordingly, for the long-term benefit of both the environment and human development, the concept of sustainable development was proffered as the approach that governments should adopt in order to achieve such objectives.

⁶⁴ World Charter for Nature, note 61, paragraph 7.

⁶⁵ WCED, note 54. The Commission was established in 1983 as an independent body, associated to governments and the UN system, but outside their control.

⁶⁶ WCED, note 54, p.43

Discussions on the relationship between the environment and development reached a pinnacle in 1992 with the convening of the United Nations Conference on Environment and Development (UNCED).⁶⁸ The sustainable development concept featured as the ultimate objective in the resulting Rio Declaration, endorsing the definition established in the Brundtland Report. Significantly, the Declaration advocates the 'further development of international law in the field of sustainable development',⁶⁹ the results and implications of which will become evident in subsequent discussions.

The ten-year anniversary of UNCED saw Johannesburg play host to a follow-up UN conference, the 2002 World Summit on Sustainable Development (WSSD).⁷⁰ The inclusion of the sustainable development term in the Summit's title and the use of the UN Commission on Sustainable Development (CSD)⁷¹ as the Preparatory Committee, suggested that a focus on the sustainable development concept was going to dominate proceedings. The Summit addressed current issues of sustainable development and tracked the progress since the adoption of the Rio Declaration in 1992.⁷² However, despite the conclusion by

⁶⁷ *Ibid.*

⁶⁸ UNCED was held in Rio de Janeiro from 3-14 June 1992.

⁶⁹ Rio Declaration, principle 27.

⁷⁰ The Summit took place in Johannesburg, South Africa from 26 August to 4 September 2002. Information about the Summit is available on the website <<http://www.johannesburgsummit.org/index.html>>.

⁷¹ For further information on the objectives and programmes of the CSD, see the website <<http://www.un.org/esa/sustdev/csd.htm>>.

⁷² For a discussion on the success and outcomes of WSSD, see e.g. K.Gray 'World Summit on Sustainable Development: Accomplishments and New Directions?' 52(1) *ICLQ* (2003) 256; A.Marong 'From Rio to Johannesburg: Reflections on the Role of

participating states of a political declaration⁷³ and a detailed Plan of Implementation,⁷⁴ the WSSD failed to make any significant additional contribution to the development or implementation of the sustainable development concept. Instead the WSSD was considered by some to be something of a periodic formality in global environmental conferences, as opposed to making any significant contribution to the objective of global sustainable development.⁷⁵

The principle of sustainable development has been the topic of some debate in respect of its normative status within international law. Vice-President Weeramantry in the ICJ recognised sustainable development as ‘...more than a mere concept ... [but rather] ...a principle with normative value’, in particular, identifying sustainable development as a ‘principle of reconciliation’ in international law between the right to development and environmental protection.⁷⁶ However, the proposition that sustainable development is now a binding norm in international law has been refuted by the argument that international law neither requires, nor in this case recognises, a need for a principle of reconciliation where norms of international law may conflict and, furthermore, that the concept of

International Legal Norms in Sustainable Development’ 16(2) *Georgetown International Environmental Law Review* (2003) 21; G.Pring ‘The 2002 Johannesburg World Summit on Sustainable Development: International Environmental Law Collides with Reality, Turning Jo'burg into "Joke'burg"’ 30(3) *Denver Journal of International Law and Policy* (2003) 410.

⁷³ UN Doc. A/CONF.199/20, Report of the World Summit on Sustainable Development (4 September 2002) 1.

⁷⁴ *Ibid* at 6.

⁷⁵ E.g. G.Seyfang and A.Jordan ‘The Johannesburg Summit and Sustainable Development: How Effective Are Environmental Mega-Conferences?’ *Yearbook on International Co-operation on Environment and Development* (2002/03) 19.

⁷⁶ Separate opinion of Vice-President Weeramantry, *Case Concerning the Gabčíkovo-Nagymaros Dam (Hungary/Slovakia)* (1993).

sustainable development has not become established as a 'binding legal norm by virtue of its acceptance by the international community'.⁷⁷ Both of these arguments are merited. Whilst it would be very difficult (or indeed completely unrealistic) to convincingly ascertain an independent right to sustainable development within the public international law, there undoubtedly is increasing support for the principle of sustainable development by the international legal system. Moreover, many – although not all – of the elements that collectively constitute sustainable development can be seen to have some independent normative value (see chapter four). Therefore, it is regarded that sustainable development is an emerging principle within international law and whilst it is recognised that it does not currently possess independent normative status, it is however increasingly adopting much of the substantive legal content that will one day lead to the principle of sustainable development having independent normative status in the international legal system.

The principle of sustainable development has thus exploded onto the international scene, being especially prevalent over the last 15 years. Initially a measure of resource sustainability, the concept is now employed to describe anything from a strict conservation regime, to a hap-hazard excuse for prioritising development objectives over their environmental counterparts. Whilst various interpretations of the concept exist, the definition concluded by the Brundtland Commission remains the most universally accepted. Thus, it is this interpretation that is carried forward

⁷⁷ V.Lowe 'Sustainable Development and Unsustainable Arguments' in A.Boyle and

and applied to the relationship between tourism and the environment, in order to determine exactly what constitutes 'sustainable tourism'.

1.3.2 Sustainable Tourism

Given the wide application of the sustainable development principle, it was inevitable that such a concept would be applied to the tourism industry, which demonstrates extensive potential for environmental degradation.⁷⁸ Although much discussion has been undertaken on what sustainable tourism might specifically constitute, definitions have typically been vague and, therefore difficult to apply in a practical sense.⁷⁹ Nevertheless, the characteristics of the tourism industry and its continuing international development provide for a relatively direct application of the Brundtland definition. As with other threats to the natural environment, the idea of sustainable tourism addresses the tension between environmental and development priorities, with a view to achieving a balanced and mutually beneficial relationship between the two.

D.Freestone *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: OUP, 1999) ch.2.

⁷⁸ The idea of applying sustainable development to the tourism industry is often credited to Jost Krippendorf in his seminal work *The Holiday Makers: Understanding the Impact of Leisure and Travel* (London: Heinemann, 1987). For a theoretical background to sustainable tourism see L.France (ed.) *The Earthscan Reader in Sustainable Tourism* (London: Earthscan, 1997) 11-15.

⁷⁹ See generally, Z.Liu 'Sustainable Tourism Development: A Critique' 11(6) *Journal of Sustainable Tourism* (2003) 459; H.Muller 'The Thorny Path to Sustainable Tourism Development; in L.France (ed.) *The Earthscan Reader in Sustainable Tourism* (London: Earthscan, 1997); A.Marx 'Towards Sustainability? The Case of Tourism and the EU' 6(6) *RECIEL* (1997) 181; K.Woodward 'Loving the Environment to Death: Can Law Protect the Environment from the Leisure Threat?' 5(5) *RECIEL* (1996) 148; P.Murphy 'Tourism and Sustainable Development' in W.Theobald (ed.) *Global Tourism: The Next Decade* (Oxford: Butterworth-Heinemann, 1994).

The World Tourism Organisation integrated the ideas of sustainable development and tourism by formally concluding a conceptual definition for 'sustainable development of tourism', attempting to reconcile the environmental, economic and socio-cultural aspects of tourism, with a view to establishing a suitable balance between the three dimensions to guarantee the long-term sustainability of tourism.⁸⁰ First, the WTO identifies that sustainable tourism must '*make optimal use of environmental resources that constitute a key element in tourism development, maintaining essential ecological processes and helping to conserve natural heritage and biodiversity*'.⁸¹ Here the WTO is recognising the environmental impacts of tourism activities and acknowledging the dependent relationship tourism has with the natural environment. In order to be effective, this must include not only the physical impacts, such as the utilisation of natural resources and the pollution occurring as a direct result of tourist activities, but also the subtle ecological imbalances and habitat destruction or relocation which may additionally occur.⁸² Thus, sustainable tourism must ensure the ongoing sustainability of the natural environment and its biological diversity.

⁸⁰ See the WTO website <<http://www.world-tourism.org/sustainable/top/concepts.html>>. Prior to 2004 the WTO's definition of 'sustainable tourism' was that which 'meets the needs of present tourists and host regions while protecting and enhancing opportunities for the future. It is envisaged as leading to management of all resources in such a way that economic, social and aesthetic needs can be fulfilled while maintaining cultural integrity, essential ecological processes, biological diversity and life support systems'. Whilst not deviating from the intention of the original definition, the new definition concluded by the WTO highlights the need to reconcile the competing interests, and elaborates on each of the three dimensions in greater detail.

⁸¹ See the WTO website <<http://www.world-tourism.org/sustainable/top/concepts.html>>.

⁸² Mathieson and Wall, note 7, chapter 4.

Secondly, the WTO requires sustainable tourism to '*respect the socio-cultural authenticity of host communities, conserve their built and living cultural heritage and traditional values, and contribute to inter-cultural understanding and tolerance*'.⁸³ The sustainability of social and cultural traditions, the experience of which is deemed fundamental to many tourists, faces similar issues to those confronting the environment.⁸⁴ The sustainability of many local cultures is threatened by tourism as communities in developing countries commonly view it as a solution to poverty – albeit as a trade-off for the loss of local tradition and indigenous identity.⁸⁵ This can occur in a multitude of ways, including the loss of authenticity, adapting to tourists demands, and commodification of ethnic rites and festivals.⁸⁶ Accordingly, evaluating the level at which tourism can operate within a community without generating unsustainable patterns of behaviour must be determined by a defined set of assessment criteria distinctive to local cultures.

Finally, the WTO definition stipulates that sustainable tourism must 'ensure viable, long-term economic operations, *providing socio-economic*

⁸³ See the WTO website <<http://www.world-tourism.org/sustainable/top/concepts.html>>.

⁸⁴ E.g. the significance of social and cultural traditions can be seen to be degraded in some respects as a result of over-popularisation by the tourism industry at 'attractions'. The nine-day festival in Pamplona, Spain which includes the 'running of the bulls' honours the city's patron saint, San Fermín, and similarly, La Tomatina (the tomato throwing fight), in Buñol, Spain honours the town's patron saint, San Luis Bertrán, and the Virgin Mary – both are now renowned international tourist events.

⁸⁵ Given that '[i]n the world's 49 so-called least developed countries, most of which are in Africa and Asia, tourism is now the second largest source of foreign exchange after oil', it is easy to appreciate why developing countries are welcoming tourism as a way of increasing revenue and advancing development, albeit at the cost of losing traditional social customs and traditions. In this sense, rising economic prosperity brings with it the wider effects of globalisation (or westernisation). See L. Mastny 'Redirecting International Tourism' in Worldwatch Institute *State of the World 2002: Progress Towards a Sustainable Society* (London: Earthscan, 2002) 105-109.

benefits to all stakeholders that are fairly distributed, including stable employment and income-earning opportunities and social services to host communities, and contributing to poverty alleviation.⁸⁷ This dimension is all the more significant given that tourism activities now represent the world's most lucrative industry.⁸⁸ However, the methods for assessing the economic sustainability of a tourism operation vary greatly compared with the standards required for other assessment criteria, with economic sustainability based predominately on making tourist activities as affordable as possible in order to increase revenue generation. Thus, what is deemed to be a sustainable level of tourism based upon economic assessment criteria may prove to be entirely unsustainable in environmental terms. This can be illustrated by the 'economic leakage' principle common to many tourist destinations located in developing countries.⁸⁹ Where expenditure can be attributed to tourism in a local community, the 'leakage' is the portion of that revenue which leaves the community by way of taxes, profits, wages, imports and the like, which are subsequently paid outside the community. Estimates suggest that high leakage (up to 70% - 80% of tourism expenditure) is common in some developing countries, leaving local communities with a fraction of the total revenue generated by tourism activities.⁹⁰

⁸⁶ For further discussion on this point, see the UNEP Tourism website <<http://www.uneptie.org/pc/tourism/sust-tourism/soc-drawbacks.htm>>.

⁸⁷ See the WTO website <<http://www.world-tourism.org/sustainable/top/concepts.html>>.

⁸⁸ World Tourism Organisation *Tourism Highlights 2003* (Madrid: World Tourism Organisation, 2003).

⁸⁹ For an overview of the economic leakage principle see e.g. Mastny, note 85, p. 106-107; R. Prosser 'The Ethics of Tourism' in D. Cooper and J. Palmer (eds.) *The Environment in Question: Ethics and Global Issues* (London: Routledge, 1992) 43-45.

⁹⁰ See 'Economic Impacts of Tourism' on the UNEP website at <<http://www.uneptie.org/pc/tourism/sust-tourism/economic.htm>>; Scientific Meeting of the Zoological Society of London 'Getting Ecotourism Right: Turning a Marketing Ploy

The WTO goes some way to recognising how each of these three dimensions are to be reconciled in order to achieve sustainable tourism. Notably, the 'informed participation of all relevant stakeholders, as well as strong political leadership to ensure wide participation and consensus building' is required, along with the 'constant monitoring of impacts' in order to enable the introduction of 'necessary preventive and/or corrective measures whenever necessary'.⁹¹ The significance of these individual measures and their practical implementation within the international legal system are examined in Chapter Four.

The core similarities between this definition and the Brundtland Commission's interpretation of sustainable development are obvious.⁹² Both definitions focus on the fulfilment of current needs, whilst ensuring sufficient resources for the future by way of guaranteeing 'long-term sustainability'. However, the balancing of interests and the prioritisation of elements within the sustainable tourism concept is a difficult task with a number of competing interests vying for priority. The WTO has made some effort to further substantiate its definition, by concluding a set of indicators of sustainable tourism to aid countries with the development of sustainable tourism projects.⁹³ Core indicators such as pollution levels,

into a Tool for Conservation' (12 February 2002) Zoological Society of London. Presented by Professor Nigel Leader-Williams, Durrell Institute of Conservation and Ecology.

⁹¹ See the WTO website <<http://www.world-tourism.org/sustainable/top/concepts.html>>.

⁹² The Brundtland Commission defines sustainable development as development that meets the needs of the present without compromising the ability of future generations to meet their own needs. See WCED, note 54, p.43.

⁹³ *WTO Indicators of Sustainable Development for Tourism Destinations - A Guidebook* (WTO: Madrid, 2004).

use intensity, species diversity, and erosion rates are identified for different environments,⁹⁴ with suggested measures for monitoring environmental degradation.⁹⁵ However, these indicators are general in nature and, as such, would be of benefit to tourism operators only in a subsidiary sense.⁹⁶ Furthermore, in order to be effective, generic indicators such as these would need to be adapted to specific tourism activities and up-dated on a regular basis to be responsive to new trends and developments.

1.4 Ecotourism: Environmentally Sustainable Tourism?

In recognising that sustainable tourism is largely a compromise between environmental, economic and social priorities, the concept of ecotourism initially presents itself as a solution to these competing interests by providing an alternative – essentially, ‘environmentally sustainable tourism’.⁹⁷ The emergence of alternative forms of tourism has been inspired over recent years in response to the significant increase in mass tourism (and the subsequent effects on local communities and the

⁹⁴ Namely coastal zones, beach destinations and sites, small islands, desert and arid areas, mountain destinations, natural and sensitive ecological sites, ecotourism destinations, parks and protected areas, communities within or adjacent to protected areas, trails or routes, built heritage sites, small and traditional communities, urban tourism, conventions and convention centres, communities seeking tourism development, theme parks, water parks, and cruise ships and their destinations.

⁹⁵ WTO, note 93, p. 247-303.

⁹⁶ WTO, note 93, p. 55.

⁹⁷ For a general discussion on how ecotourism has been approached by the international community, see e.g. M.Wood *Ecotourism: Principles, Practices & Policies for Sustainability* (Paris: UNEP, 2002); L.Quesenberry ‘Ecotourism: A Hyperbolic Sustainable Development Technique’ 9 *Dickinson Journal of Environmental Law and Policy* (2001) 73; France, note 78; E.Cater and G.Lowman (eds.) *Ecotourism: A Sustainable Option?* (Chichester: John Wiley, 1994); D.Hawkins ‘Ecotourism:

environment), coupled with the high economic leakage experienced in many developing countries.⁹⁸ Variations of these alternative holidays (which generally exhibit a more sensitive approach to travel) include adventure, nature, and community focused tourism.⁹⁹ However, the variant to receive the most international support, and to be commonly represented as the most popular form of alternative tourism, is that of ecotourism.¹⁰⁰ In fact, the development of 'ecotourism' as an alternative form of travel has grown remarkably over recent years with estimates indicating a 20 percent annual growth rate, compared to seven percent for tourism overall.¹⁰¹

As with the concepts of 'tourism' and 'sustainable tourism', the lack of any universal definition of ecotourism means that, to date, an ad hoc approach has been adopted in order to identify the boundaries of the concept. The World Tourism Organisation neglects to provide a definition, but instead offers a number of distinguishable characteristics of ecotourism,¹⁰² similar

Opportunities for Developing Countries' in W.Theobald (ed.) *Global Tourism: The Next Decade* (Oxford: Butterworth-Heinemann, 1994).

⁹⁸ France, note 78, p. 15.

⁹⁹ 'Adventure tourism' is usually resource-based and involves physical challenge, education and contact with nature; 'community tourism' is typically run by and for the local community; and 'nature tourism' focuses on the study and/or observation of flora, fauna and/or landscape. See France, note 78, p. 15-18.

¹⁰⁰ For a discussion on the evolution of ecotourism, see H.Ceballos-Lascurain *Tourism, Ecotourism and Protected Areas: the State of Nature-based Tourism Around the World and Guidelines for its Development* (Gland: IUCN, 1996).

¹⁰¹ Estimates formulated by The International Ecotourism Society (TIES) and cited in Worldwatch Institute *State of the World 2002: Progress Towards a Sustainable Society* (London: Earthscan, 2002) 113.

¹⁰² See the WTO 'Concept Paper on the International Year of Ecotourism' available on the website <<http://www.world-tourism.org/sustainable/IYE/WTO-UNEP-Concept-Paper.htm>>. The WTO identifies the main characteristics of ecotourism as being nature-based travel where the main motivation is the observation and appreciation of nature; incorporating education features; often undertaken in small groups by locally-owned businesses; minimising the negative natural and socio-cultural impacts; and supporting the protection of natural areas.

to those proffered by the United Nations Environment Programme.¹⁰³ Both emphasise features such as small-scale, nature-based tourism with an educational element, contributing to conservation and including the participation of local communities. A specific definition for ecotourism has, however, been concluded in two other fora. First, the International Ecotourism Society (TIES)¹⁰⁴ claims ecotourism is 'responsible travel to natural areas that conserves the environment and sustains the well being of local people'.¹⁰⁵ Secondly, the World Conservation Union (IUCN) states that ecotourism is

'environmentally responsible travel and visitation to relatively undisturbed natural areas, in order to enjoy and appreciate nature (and any accompanying cultural features – both past and present) that promotes conservation, has low visitor impact, and provides for beneficially active socio-economic involvement of local populations'.¹⁰⁶

Accordingly, whilst there is no single definitive explanation of ecotourism, the essence of the concept can be deduced as a responsible form of travel

¹⁰³ UNEP identifies the basic elements of ecotourism as contributing to the conservation on biodiversity; sustaining the well-being of local people, including a learning experience; involving responsible action by tourists; delivered to small groups by small-scale businesses; requiring the lowest consumption of non-renewable resources; and emphasising local participation. See the UNEP Tourism Programme <<http://www.uneptie.org/pc/tourism/ecotourism/home.htm>>, and Wood, note 97, p. 14.

¹⁰⁴ The International Ecotourism Society (TIES) is a US based non-governmental organisation with a global network of approximately 1,600 members in 110 countries incorporating members from the private sector, educational institutions, government bodies and non-governmental organisations. See the TIES website <<http://www.ecotourism.org>>.

¹⁰⁵ See the TIES website <<http://www.ecotourism.org>>.

¹⁰⁶ Wood, note 97, p. 9; Ceballos-Lascurain, note 100, p. 20.

prioritised by the sustainability of the environment and local cultures, whilst incorporating an educational learning experience with an emphasis on small-scale participation, including local ownership and involvement.

One major problem facing the ecotourism definition is the confusion as to whether activities represent a 'product or principle'.¹⁰⁷ The commercial characteristics of the tourism industry mean that 'ecotourism' can be identified either as a conservation concept, or as a niche market segment of the tourism industry.¹⁰⁸ Ecotourism is fundamentally a derivative of nature-based travel, but with enhanced ethical and conservation objectives whilst, conversely, sustainable tourism, rather than being an identifiable market segment, is a conservation principle applicable to any form of tourist activity.¹⁰⁹ Accordingly, an ecotourism enterprise should (in theory) always encompass sustainability principles, while sustainable tourism can apply to any number of tourist operations.¹¹⁰

The nature of the tourism industry means that operators, ranging from multinational airlines and hotel chains to local one-person service providers, can identify their enterprise as an ecotourism operation, consequently aligning their business with the principles and standards

¹⁰⁷ Cater and Lowman, note 97, p. 3-5.

¹⁰⁸ Regarding ecotourism as a market segment and marketing tool, see P.Wight 'Environmentally Responsible Marketing of Tourism' in E.Cater and G.Lowman (eds.) *Ecotourism: A Sustainable Option?* (Chichester: John Wiley, 1994); Hawkins, note 97, p. 263-264.

¹⁰⁹ On the difference between ecotourism and sustainable tourism, see e.g. Wood, note 97, p. 12-13; Ceballos-Lascurain, note 98, p. 20.

¹¹⁰ For an introduction to the relationship between the concept of ecotourism and that of sustainable development, see e.g. L.Quesenberry 'Ecotourism: A Hyperbolic Sustainable Development Technique' 9 *Dickinson Journal of Environmental Law and Policy* (2001) 473.

attributed to the ecotourism concept.¹¹¹ This act of 'greenwashing' by tourist operators can be traced back to the popularisation of nature-based tourism, where any activity associated with nature or wilderness-orientated travel was similarly labelled 'nature-tourism', implying conservation principles.¹¹² There are obvious problems associated with this approach, in that a certain standard of responsibility and conservation is now associated with the ecotourism concept, whilst no responsibility is accepted for the accompanying sustainability objectives and principles.¹¹³

Finally, the concept of ecotourism has been acknowledged and credited with further impetus following the declaration by the United Nations of 2002 as the International Year of Ecotourism (IYE).¹¹⁴ The result of this UN-sponsored occasion was a number of regional preparatory conferences on ecotourism issues, culminating in the inaugural 2002 World Ecotourism Summit.¹¹⁵ Attended by delegates from governments, private businesses, trade associations, non-governmental organisations, international organisations and academic institutions, the Summit concluded a non-

¹¹¹ For an overview of the impact of globalisation on ecotourism, see e.g. A.O'Neill 'What Globalisation Means for Ecotourism: Managing Globalisation's Impacts on Ecotourism in Developing Countries' 9 *Indiana Journal of Global Legal Studies* (2002) 501.

¹¹² For a discussion on 'greenwashing' see e.g. Wight, note 108; Hawkins, note 97, p. 264-266.

¹¹³ Ecotourism has had a positive environmental and social impact in parts of Latin America. See e.g. M.Kerr 'Ecotourism: Alleviating the Negative Effects of Deforestation on Indigenous Peoples in Latin America' 14 *Colorado Journal of International Environmental Law* (2003) 335.

¹¹⁴ UN Resolution 1998/40 Declaring the year 2002 as the International Year of Ecotourism; UNGA Resolution 53/200 (22 February 1999) Proclamation of 2002 as the International Year of Ecotourism. The IYE does not prescribe a specific definition for 'ecotourism', but instead draws on earlier definitions concluded by other bodies and highlights the main characteristics of the ecotourism concept. See the WTO-UNEP Concept Paper on the IYE 2002, available on the WTO website <<http://www.world-tourism.org/sustainable/IYE/WTO-UNEP-Concept-Paper.htm>>.

¹¹⁵ Held in Quebec, Canada from 19-22 May 2002. On the declaration of 2002 as the IYE, see e.g. L. Vivanco 'Escaping From Reality' 32(2) *The Ecologist* (2002) 26.

negotiated multi-stakeholder dialogue outlining a set of recommendations for the development of ecotourism activities, within the context of sustainable development (the Quebec Declaration on Ecotourism).¹¹⁶ Identifying the main participants in the ecotourism sector, the Quebec Declaration makes a series of recommendations to each group outlining how ecotourism should be managed and developed in future years.¹¹⁷ Whilst the Declaration does employ many of the principles found within the greater sustainable development philosophy,¹¹⁸ critics still consider the IYE largely to be the promotion of ecotourism as an exploitable niche market ('mass nature tourism') and a further tool for development of the industry.¹¹⁹

So is ecotourism really a form of environmentally sustainable tourism? As a concept, ecotourism certainly has at its core conservation principles that appear to prioritise environmental sustainability. However in reality, ecotourism encompasses far more than the environment – with cultural, educational and participatory values also playing a central role in the characterisation of ecotourism objectives. It seems likely that the majority of ecotourism activities will continue to be identified as a market segment, detracting from the principles and objectives embedded in its conservation-

¹¹⁶ The Quebec Declaration on Ecotourism is available on the website <<http://www.ecotourisme2002.org/>>.

¹¹⁷ Recommendations are made to national, regional and local governments (recommendations 1-19); the private sector (20-33); NGOs, community-based associations, academic and research institutions (34-37); inter-governmental organisations, international financial institutions and development assistance agencies (38-45); local and indigenous communities (46-47); and the World Summit on Sustainable Development (48-49).

¹¹⁸ E.g. sustainable use, environmental impact assessment, polluter pays, participation, cooperation etc.

¹¹⁹ Vivanco, note 115, p. 26; Mastny, note 85, p. 116-117.

based definition established by TIES and the IUCN. Furthermore, the popularisation of ecotourism may well create many of the same social and environmental problems associated with other forms of tourism.¹²⁰ Ecotourism operations based on wildlife viewing has reportedly resulted in the transmission of tuberculosis from tourists to mongooses at the Chobe National Park in Botswana, whilst research suggests mountain gorillas in Uganda are catching mange from humans as they lose their fear of people.¹²¹ Natural habitats face similar pressures from ecotourism activities. Development of the 20,000 square-mile wilderness at East Kootenay, British Columbia as an ecotourism destination has been linked to plummeting numbers of local caribou population and the disappearance of rare local wolves,¹²² whilst the promotion ecotourism within Costa Rica's Monteverde rainforest reserve threatens the health of the rainforest and has contributed to localised air pollution.¹²³ Accordingly, whilst the concept of ecotourism promises much in the way of environmentally sustainable tourism, it fails to deliver on many accounts, owing largely to its monopolisation by the greater tourism industry and lack of international structure and control. Ecotourism represents a concept capable of being many different things and, as such, loses much of its fundamental value as a conservation technique.

¹²⁰ 'Ecotourism' operations in, for example, the Arctic will still result in environmental problems if popularity results in rising tourism numbers to the area. See e.g. A. Ananthaswamy 'Massive Growth of Ecotourism Worries Biologists' *New Scientist* (4 March 2004) 6; Anon 'Ecotourism Takes a Toll on Wildlife' *Environmental News Network* (4 March 2004) available at <http://www.enr.com/news/2004-03-04/s_13696.asp>.

¹²¹ C. Arthur 'Rise of Eco-tourism May Be Putting Wildlife in Danger' *The Independent* (27 June 2002) 10.

¹²² A. Piore 'Trouble in Paradise' *Newsweek* (July 22/July 29 2002) 46.

¹²³ J. Monahan 'Unique Costa Rica Rainforest at Risk' *BBC News* (19 December 2004) available at the website <<http://news.bbc.co.uk/1/hi/world/americas/4061833.stm>>.

1.5 Conclusion

The concept of tourism has been defined from economic and statistical perspectives, primarily for the purpose of measuring and attributing value to the tourism industry. Early attempts at clarifying the tourism concept have resulted in a definition that focuses on when a person might be considered a tourist, based upon the duration, location and purpose of travel.¹²⁴ Whilst this definition offers some assistance in ascertaining what constitutes 'tourism', the definition provides no indication as to the extent of the relationship between tourism and the environment, or the subsequent problems created as a result of this relationship. Accordingly, the definition of tourism from which this thesis develops is a very basic one, originating from economic and statistical foundations.

The identification of three different relationships between tourism and environmental concern highlight the possibility for a mutually advantageous arrangement (a state of symbiosis); however, reality suggests that in the majority of cases the relationship between tourism and the environment deteriorates into one of conflict – where the environment is most often the victim. This is especially apparent in areas which are subject to mass tourism (often where tourists visit as part of chartered or package-type excursions) as the environmental impacts are comparatively greater due to the high expectations of such tourists for extensive

¹²⁴ Based on the WTO definition of tourism. See *infra* 1.1.

secondary resources.¹²⁵ Thus, there is a need for some type of regulation or management to safeguard the primary and secondary resources affected by the growing international tourism industry.

As a result of tourism experiencing a large period of largely unrestricted growth and market expansion before environmental concern developed, the problem of reconciling the two interests is now even more apparent. The most obvious way in which this has happened is via 'sustainable tourism', although there are problems with employing this concept as a method for reconciliation. The most widely acknowledged definition of sustainable tourism – expounded by the World Tourism Organisation – draws heavily on the principle of sustainable development and focuses on the ideas of satisfying needs and imposing limitations outlined in the Brundtland Report. Whilst the Brundtland definition does not specifically refer to the environment or the promotion of environmental concerns (sustainable development is 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'),¹²⁶ the WTO's definition of 'sustainable development of tourism' appears to develop the concept further. In particular, sustainable tourism should reconcile the environmental, economic and socio-cultural aspects of tourism, with a view to establishing a suitable balance between the three

¹²⁵ E.g. cruise ships now possess an extensive range of on-board facilities for tourists including swimming pools, bars, restaurants, and shopping malls with some also boasting an ice skating rink and golf course. It follows that tourists expect a similar level of resources when docking at ports during the course of the cruise, albeit in small often comparatively under-developed towns as part of their journey. See J. Quinn 'Full Steam Ahead' *BBC News* 19 May 2004, available on the website <<http://news.bbc.co.uk/1/hi/magazine/3726145.stm>>.

¹²⁶ WCED, note 54, p. 43.

dimensions to guarantee the long-term sustainability of tourism.¹²⁷ It appears that the intention of this definition is that participants take into consideration environmental issues when determining what constitutes sustainable tourism development. However, the question of prioritisation of environmental concerns with other interests (such as economic, social, and cultural matters) remains an inevitable hurdle for environmental advocates.

A final point on the sustainable tourism definition relates to the precise terminology used by the WTO. By employing the term 'sustainable development of tourism' as opposed to 'sustainable tourism', the WTO arguably implies that sustainability principles apply only to the *development* of tourism operations, rather than the day-to-day activities undertaken as part of the tourism industry as a whole.¹²⁸ However, in the context of the WTO and the global tourism industry, it is likely that the definition is intended to extend to the more general conduct of tourism activities (that is, the development of sustainability within tourism), thereby applying the principle of sustainable development to the numerous activities found within the tourism industry. It is this more general (and inclusive) interpretation that is adopted throughout the thesis and thus, subsequent discussion will refer to the concept of 'sustainable tourism'.

¹²⁷ As defined by the WTO, see the website <<http://www.world-tourism.org/sustainable/top/concepts.html>>.

¹²⁸ 'Sustainable tourism' might apply to all tourism related activities, such as constructing a visitor centre and the day-to-day tourism operations undertaken as part of that development, whilst 'sustainable tourism development' seems to be applicable only to the actual development (of, for example, the visitor centre).

Given the challenges faced in reconciling and prioritising the different interests within sustainable tourism, the concept of ecotourism presents itself as a possible solution for achieving environmentally sustainable tourism. However, the concept has been subject to various interpretations and manipulation, with the result that ecotourism may now represent anything from a conservation-based tourism operation, to a marketable product or niche industry void of any genuine environmental consciousness. Therefore, ecotourism does not appear to offer the anticipated solution to environmentally sustainable tourism and, as such, a return is made to the concept of sustainable tourism as the most suitable conceptual vehicle for establishing an environmental mandate within the tourism industry.

Before the concept of sustainable tourism is explored to ascertain what (if any) legal impact or obligation it might establish, tourism is first considered from an international perspective, assessing the reaction of the international legal system to its global development.

2.

Tourism and the International Legal System

Following the conclusions reached in Chapter One regarding the relationship between tourism and the natural environment, discussion in this chapter now turns to examine the way in which tourism is approached within the international legal system. First, different participants are examined in order to determine their role and status within the legal system. This analysis clarifies the legal status of states, individuals, multinational enterprises, non-governmental organisations, and international organisations within the tourism industry and furthermore, elucidates their individual ability to contribute to the cause of international environmental protection. Following this, international organisations most salient with regard to tourism are examined to determine their place in the international legal system.¹ First, the activities of the United Nations (UN) are explored in order to determine how tourism has been addressed by the international community in this forum. In particular, the work of the Commission on Sustainable Development and the tourism initiative of the UN Environment Programme (UNEP) provide interesting examples. Next, attention is directed toward the World Tourism Organisation (WTO),² which has recently been transformed into a specialised agency of the United Nations.

¹ Whilst it is not possible to discuss every organisation or initiative which addresses tourism in the international arena, this chapter attempts to draw attention to the major participants in respect both of present performance and future potential. Additional participants, for which there is not scope to discuss in this thesis, are referred to in footnotes.

² The World Tourism Organisation shares the same abbreviated title as the World Trade Organisation. For the purpose of this thesis, WTO shall refer to the World Tourism Organisation.

An evaluation of the structure, functions, current work programme, legal authority, and future potential of the WTO, offers an insight into this important international organisation, demonstrating its influence on the tourism industry and role within the international legal system.

It is the intention of this chapter to examine the way in which tourism, as an industry, operates within the international legal system and to identify potential regulatory techniques based on this analysis. First, however, is an introduction to the international legal system, illustrating the way in which the tourism industry is shaped by international law.

2.1 Tourism in the International Legal System

Chapter One argued that the tourism industry, in many cases, poses a potential threat to the global natural environment. Whilst this is most commonly identified in respect of large-scale mass tourism, neither nature-based activities, nor ecotourism, are entirely without environmental consequence. Tourism is an inherently global phenomenon embracing activities which take place in global, regional and transboundary contexts, as well as within national boundaries.³ As such, tourism regulation, in order

³ One example is climate change. Whilst levels of greenhouse gas emissions can be attributed to individual states, the problem of climate change remains global owing to, *inter alia*, the impacts of state behaviour transcending national boundaries (e.g. the effects of carbon sinks or deforestation may be felt in other states), the inability of one state (or even a group states) to effectively address and correct the problem, and the indivisible nature of the atmosphere. By its very nature, tourism contributes to climate change by increasing demands on transportation (especially aviation) and promoting the industrial development of tourism infrastructure, both of which result in the accelerated emission of greenhouse gases. In a situation such as this, a national or regional regulatory approach does not offer a sufficiently comprehensive regime by which to successfully address the global nature of the problem.

to be truly effective, must be approached from an international perspective and accordingly, addressed by the international legal system.⁴

2.1.1 Approaching Tourism Regulation through Public International Law

Public international law contains a substantial body of rules and principles devoted to the protection of the global environment.⁵ Virtually all aspects of the environment are subject to some regulatory regime within the international legal system,⁶ whilst public international law texts now commonly include a discussion on environmental protection.⁷ Given the recognition of environmental issues by the international legal system and the link identified between tourism and environmental degradation, public international law appears *prima facie* to be a suitable vehicle for the

⁴ Attempts to regulate tourism activities have, so far, mainly taken place within municipal law (e.g. the Bulgaria Tourism Act 1998; the Estonia Act on Sustainable Development (and Tourism Law currently in draft); the 1990 Myanmar Tourism Law; New Zealand Resource Management Act 1991. For an overview of national laws relating to sustainable tourism see the UN website <<http://www.un.org/esa/agenda21/natlinfo/agenda21/issue/eco.htm#tour>>), and regional agreements (e.g. 1996 Tourism Protocol to the 1991 Convention on the Protection of the Alps is an agreement between France, Italy, Germany and Slovenia).

⁵ For a discussion on the structure and nature of public international law see e.g. R.Jennings and A.Watts (eds.), *Oppenheim's International Law* (London: Longman, 1992 9th edition) ch.1; P.Allott 'The Concept of International Law' 10 *EJIL* (1999) 31; D.Shelton 'International Law and Relative Normativity' in M.Evans (ed) *International Law* (Oxford: OUP, 2003); R.Higgins *Problems and Process: International Law and How We Use It* (Oxford: Clarendon, 1994) ch. 1. The purpose of international law is described by M.Koskenniemi 'What is International Law For?' in M.Evans (ed) *International Law* (Oxford: OUP, 2003). For a outline of the evolution of the international legal system see e.g. M.Shaw *International Law* (Cambridge: Grotius, 2003 5th edition) ch. 1; M.Koskenniemi *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: CUP, 2001); S.Neff 'A Short History of International Law' in M.Evans (ed) *International Law* (Oxford: OUP, 2003); L.Gross 'The Peace of Westphalia, 1648-1948' 42 *AJIL* 20. The basic theory of international law is discussed in I.Scobbie 'Some Common Heresies About International Law: Sundry Theoretical Perspectives' in M.Evans (ed) *International Law* (Oxford: OUP, 2003).

⁶ E.g. international environmental law extends regulation to the atmosphere and outer space, biological diversity, watercourses, the marine environment, hazardous waste, nuclear energy, and the Polar Regions.

⁷ E.g. Shaw, note 5, ch. 15; M.Evans (ed) *International Law* (Oxford: OUP, 2003) ch. 21; I.Brownlie *Principles of Public International Law* (Oxford: OUP, 2003 6th edition) ch. 13; A.Cassese *International Law* (Oxford: OUP, 2005 2nd edition) ch. 23.

regulation of tourism activities where there exists such an environmental threat.⁸

On the other hand, this initial conclusion may be called into question by the fact that public international law is primarily concerned with establishing substantive rights and obligations applicable to states (traditionally the dominant or exclusive subjects of public international law),⁹ whereas tourism represents the activities of numerous private sector entities – for example, individual tourists, tour operators, local communities, and interest groups – who have traditionally not been accorded international personality. Consequently, this may call into question the suitability of public international law for this task.

However, it is possible to counter this argument on two main grounds. First, there are a whole host of traditional and developing principles of public international law that are relevant to environmental protection, in addition to the primary substantive obligations and rights of states. These more general functions attributable to international law in respect of ensuring environmental protection can be found in the wider context of the international legal system.¹⁰ For example, international law has a constitutional role in providing a mechanism for negotiating international rules and standards, settling disputes, promoting cooperation, and

⁸ Note a substantial body of specialist literature has also emerged, for example, P.Birnie and A.Boyle *International Law and the Environment* (Oxford: OUP, 2002 2nd edition); P.Sands *Principles of International Environmental Law* (Cambridge: CUP, 2003 2nd edition); A.Kiss and D.Shelton *International Environmental Law* (New York: Transnational, 2004 3rd edition).

⁹ For a discussion on states being traditional subjects of international law, see *infra* at paragraph 2.1.1.

¹⁰ Birnie and Boyle, note 8, p. 7-9.

overseeing correct implementation and compliance,¹¹ which may serve to bring private sector actors indirectly within the scope of the system.¹² Furthermore, international law can, in some ways, be seen to operate in a similar way to national laws by establishing regulatory systems for environmental protection. Where national measures are in place, international regimes coordinate and harmonise the various national standards. Traditionally, international rules existed primarily in the form of treaties or customary law, but there is now an increasing use of 'soft-law' instruments by the international community.¹³ As a result, the international legal system can be viewed as a framework and coordination mechanism for global, regional, transboundary and national regulation in respect of a specific international issue.¹⁴ Secondly, and more generally, there have been major changes in perspective regarding personality and participation within the international legal community, which have the effect of causing legal rules and principles to bear directly upon participants other than states.

¹¹ For a discussion on international law as a constitution, see e.g. C.Tomuschat 'International Law as the Constitution of Mankind' in United Nations *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission* (United Nations, 1997).

¹² Many actors that traditionally do not participate within international law may indirectly play some role in the wider context of the international legal system. For example, private sector actors may be involved in the negotiation and promotion of an international instrument, or similarly, in ensuring implementation and enforcement of international standards at national or regional levels.

¹³ For a general explanation on the sources of international law, see e.g.: Shaw, note 5, ch. 3; H.Thirlway 'The Sources of International Law' in M.Evans *International Law* (Oxford: OUP, 2002); Brownlie, note 7, ch. 1; V.Degan *Sources of International Law* (The Hague: Martinus Nijhoff Publishers, 1997); G.Danilenko *Law-making in the International Community* (Dordrecht: Martinus Nijhoff Publishers, 1993); Jennings and Watts, note 5, p. 22-52. For a comparison with a non-traditional approach to identifying the sources of international law see Higgins, note 5, ch. 2.

¹⁴ For example, the Part XII of the 1982 Law of the Sea Convention (21 ILM 1261) recognises the issue of marine pollution and sets out basic standards to which states should adhere. However, much of the substance and institutional support is established at the regional level, primarily under the UNEP Regional Seas initiative, which coordinates the development and implementation of regional conventions and action plans, each of which is tailored to address the specific characteristics of an individual marine environment. The extent to which various sources of international law are implemented as part of a 'regulatory package' will become evident in chapter three, where the approach of international environmental law to the tourism industry is explored.

The legal impact of these different participants – and the extent of their presence in the tourism industry – is explored below.

2.2 Participants in the International Legal System

Whilst there are many participants in the international legal system,¹⁵ it has traditionally been considered that states are the only formal subjects of international law.¹⁶ This approach views international law as both *state-created* and *state-centred*, with other participants featuring as objects of the rules and principles generated by the system. However, this orthodox account now arguably represents an out-dated approach to the international legal system and certainly an inadequate method with which to address the global tourism industry.

The traditional notion that the international legal system should accord legal personality only to states has now been successfully refuted.¹⁷ Instead, the modern reality of the international community is more commonly recognised as encompassing many non-state actors, involved in all stages of the international law process. Both international and non-governmental organisations are becoming increasingly active in the research and drafting of international agreements as well as acting as watchdogs to ensure

¹⁵ In this context, participants include the actors which have some role in the international legal system to the extent that they either participate in law-making, or are affected by international law to some degree. For example, individuals, international organisations, multinational enterprises, and non-governmental organisations.

¹⁶ For the traditional doctrine of the subjects of international law, see H. Lauterpacht *International Law: Collected Papers, Part I, Vol. II* (Cambridge: CUP, 1975) ch. 18; Brownlie, note 7, chs. 3-5; Jennings and Watts, note 5, p. 16. More recently, individuals and international organisations are also considered to have some status as ancillary subjects of international law. See *infra* at 2.2.2 (individuals) and 2.2.5 (international organisations).

¹⁷ See e.g., Higgins, note 5; P. Sands 'The Environment, Community and International Law' 30(2) *Harvard International Law Journal* (1989) 393.

compliance.¹⁸ Furthermore, individuals can, in some cases, be held accountable in the international human rights arena.¹⁹ Thus, considering international law as a 'normative system',²⁰ whereby the various participants undertake different roles as part of the legal process, reflects more accurately the present international legal climate.

Recognising the role played by participants other than states within the international legal system is especially important in the context of environmental protection. The state-based view of international law is centred on the doctrine of the sovereignty and equality of states.²¹ Similarly, the most basic fundamental principle of international environmental law recognises that states enjoy the sovereign right to exploit their own resources, but must not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.²² However, there are certain natural resources which are considered to be of such global value that they transcend the traditional notions of state sovereignty by restricting the degree of freedom exercisable by the state.²³ In such situations the preservation of natural resources occurs by reference to international conservation standards and by making these matters the topic

¹⁸ E.g. the drafting of the 1971 Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat (996 UNTS 245) was motivated by the International Waterfowl and Wetlands Research Bureau (for a detailed overview, see G.V.T. Matthews *The Ramsar Convention on Wetlands: Its History and Development* (Gland: Ramsar Convention Bureau, 1993); the International Maritime Organisation monitors compliance with the 1982 Law of the Sea Convention.

¹⁹ E.g. in respect of international criminal responsibility.

²⁰ Higgins, note 5, ch. 1.

²¹ Brownlie, note 7, p. 289.

²² E.g. Principle 21 Stockholm Declaration and Principle 2 Rio Declaration. For a discussion on the principle of state sovereignty see e.g. N.Schrijver *Sovereignty Over Natural Resources* (Cambridge: CUP, 1997).

²³ Note that the concept of state sovereignty is not entirely transcended. See for example, Article 2(3) Ramsar Convention; Article 6(1) World Heritage Convention; and Article 4 Convention on Biological Diversity.

of legitimate global attention.²⁴ World heritage sites offer a classic example of such a situation – Peru’s Machu Picchu has been identified as possessing special international significance and accordingly, the conservation of the site is regulated by, *inter alia*, international agreement.²⁵ A further reason that the state-orientated approach does not offer an effective framework for international environmental protection is that environmental issues do not fit neatly within sovereign boundaries. Environmental pollution occurs with no respect for state borders and, as such, requires all participants of the international community to contribute towards the prevention and management of polluting activities, thereby breaking down the traditional notions of state sovereignty.

Finally, the diversity of participation within the tourism industry means that, in order for international law to operate in a truly comprehensive way, this form of regulation should also ideally extend beyond states to other participants, such as individual tourists, multinational tour companies, international tourism organisations, and civil society in general. There is now increasing support for the proposition that other participants within the international legal system may also, in some circumstances, possess legal personality in international law.²⁶ It is submitted that these participants play an increasingly significant role in the regulation of the tourism industry, for the purposes of environmental protection. Moreover, such participants

²⁴ For a description of the concept of ‘common concern’ and to distinguish this concept with that of common property, common heritage and shared natural resources, see Birnie and Boyle, note 8, p. 97-99 and 137-143.

²⁵ Inscribed in 1983 as a World Heritage site under the 1972 World Heritage Convention. This can also be illustrated by examples such as the conservation of biological diversity (Preamble, 1992 Convention on Biological Diversity), and the protection of endangered species threatened by trade (Preamble, 1973 CITES).

²⁶ E.g. Higgins, note 5, ch. 3.

enjoy some form of legal personality at various stages of the international law-making process. The creation of rights and obligations for states by the international legal system offers one avenue for the regulation and management of tourism activities – but this alone is not adequate. Each of the participants is now discussed in turn, in order to determine the extent to which the international legal system regulates and manages their activities within the tourism industry.

2.2.1 States

States are still commonly recognised as the primary subjects of public international law.²⁷ The identification of legal criteria defining statehood has been comprehensively explored by the international academic and political community,²⁸ including the recognition of legal persons and entities with special types of personality.²⁹ The rights and duties of states within the international legal system are framed around a number of basic principles.³⁰ Notably, states are considered equal entities competent to operate in the international arena (but not subject to any international

²⁷ Given the absence of contentious issues surrounding the position of states in international law, this analysis remains elementary. For a more comprehensive discussion on states as the subject of international law see e.g.: C.Warbrick 'States and Recognition in International Law' in M.Evans (ed.) *International Law* (Oxford: OUP, 2003); Shaw, note 5, p. 175-231; Brownlie, note 7, chs. 3-5; Cassese, note 7, ch. 4; H.Charlesworth and C.Chinkin *The Boundaries of International Law: A Feminist Analysis* (Manchester: MUP, 2000) ch. 5; J.Crawford *The Creation of States in International Law* (Oxford: Clarendon Press, 1979).

²⁸ Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States (165 League of Nations Treaty Series 19) establishes that 'the state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states'. For a discussion on the criteria of statehood see e.g. T.Grant 'Defining Statehood: the Montevideo Convention and its Discontents' 37 *Columbia Journal of Transnational Law* (1999) 403; R.Higgins *The Development Law through the Political Organs of the United Nations* (Oxford: OUP, 1963); J.Crawford 'The Criteria for Statehood in International Law' 48 *BYBIL* (1976-77) 93.

process without their consent), and exclusively competent in respect of internal matters. These principles have been further expounded by the International Law Commission's Declaration on the Rights and Duties of States³¹ and the General Assembly Resolution on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the United Nations.³²

So, in what way are states – as a subject of international law – relevant to the regulation of the global tourism industry? The role of states in relation to tourism is much the same as in any other area of international law, in that many rights and obligations established within the system are directly applicable to participating states. It is worth noting at this point however, that, in accordance with the principles of jurisdiction, states may exercise control over certain entities even without the existence of international treaty obligations.³³ In this way, jurisdiction is a crucial manifestation of the concept of state sovereignty, whereby a state has the capacity to control the behaviour of participants within its boundaries. The territorial principle of jurisdiction confirms a state's right to regulate the conduct of entities

²⁹ For a discussion on states as legal persons and recognition of other entities as 'states' e.g. Brownlie, note 7, chs. 3-4.

³⁰ Crawford, note 27, p. 32; Warbrick, note 27, p. 231-232.

³¹ The Declaration was adopted by the International Law Commission in 1949, but has not been endorsed by the General Assembly, thus remains as a 'draft declaration'. See the ILC website <<http://www.un.org/law/ilc/index.htm>>.

³² General Assembly Resolution 2625 (XXV) 24 October 1970 (UN Doc A/8028).

³³ For an overview of the principles of jurisdiction within international law see e.g. Shaw, note 5, ch. 12; V.Lowe 'Jurisdiction' in M.Evans (ed.) *International Law* (Oxford: OUP, 2003); Brownlie, note 7, chs. 14-15; D.Bowett 'Jurisdiction: Changing Patterns of Authority Over Activities and Resources' in C.Ku and P.Diehl (eds.) *International Law: Classic and Contemporary Readings* (London: Lynne Rienner, 1998); Higgins, note 5, ch. 4. For a classic introduction to the principle of jurisdiction in international law see M.Akehurst 'Jurisdiction in International Law' 46 *British Yearbook of International Law* (1972-3) 145.

within its territory.³⁴ Therefore, in line with the principles of jurisdiction, each state has the authority to manage its natural resources – by regulating the (tourism-orientated) entities that impact on those resources – without prescription from international sources.³⁵

It thus follows that, whilst the application of international rights and obligations to states is a generic element of the international legal system (to which tourism offers no unique application), the regulation of the activities of states alone is unlikely to prove sufficient for the effective management of tourism, given the practical impact and importance of the activities of other participants. First, however, it is necessary to offer a brief explanation of the role of states in respect of tourism.

Public international law allows for states to enter into global or regional agreements in the international arena for the purpose of addressing various issues, such as environmental protection. Acquiescence to international commitments often leads to an obligation on states to implement national legislation in order to integrate the international obligations into municipal law.³⁶ Whilst this requirement extends to any international agreement, the particular implications for applying international law to the tourism industry

³⁴ Note there are other principles of jurisdiction which may have some impact on aspects of tourism regulation, such as the nationality principle and the protective principle (for which an introduction is available at e.g. Shaw, note 5, p. 584-592).

³⁵ Note that in certain circumstances (such as where natural resources are recognised as possessing international value in accordance with, for example, the World Heritage Convention) national resources may also be subject to international regulation. However, whilst such regimes add further conservation mechanisms, it does not erode the ultimate concept of state sovereignty.

³⁶ For a discussion on the relationship between municipal and international law see e.g. Brownlie, note 7, ch. 2; Cassese, note 7, ch. 12. For an overview of the relationship between international, regional and national environmental law see F. Morrison and R. Wolfrum (eds.) *International, Regional and National Environmental Law* (The Hague: Kluwer International, 2000) ch. 3.

can be demonstrated by examining the implementation into domestic legislation of the Antarctic Treaty's 1991 Environmental Protocol.³⁷ Tourism activities within the Antarctic ecosystem represent a rapidly growing industry, posing many environmental threats to the native flora and fauna.³⁸ In response to these and other associated threats, states have concluded an international treaty to regulate activities in the Antarctic Treaty area³⁹ – namely the 1991 Environmental Protocol to the Antarctic Treaty. However, in order that the provisions of the Environmental Protocol (which *inter alia* regulate and manage Antarctic tourism activities) may create legal obligations on the relevant participants (in this case, the companies and individuals involved in Antarctic tourism), the international obligations must be implemented into the domestic legislation of participating states. The implementation of Environmental Protocol provisions into domestic legislation thus creates a direct obligation for participants within the national legal system – that is, individuals and corporations – to adhere to agreed standards in respect of their Antarctic activities.⁴⁰ For example, the Environmental Protocol requires each state party to ensure environmental impact assessment procedures are applied in the planning processes leading to decisions regarding any tourism activities

³⁷ E.g. D.Vidas (ed.) *Implementing the Environmental Protection Regime for the Antarctic* (Dordrecht: Kluwer, 2000); O.S.Stokke and D.Vidas (eds.) *Governing the Antarctic: The Effectiveness and Legitimacy of the Antarctic Treaty System* (Cambridge: CUP, 1996); F.Francioni *International Environmental Law for Antarctica* (Milan: Giuffrè Publishing, 1992).

³⁸ See *infra*, Chapter Three 3.1.1.(b)(i) and 3.2.3(c).

³⁹ The Antarctic Treaty area extends to the area south of 60° South Latitude: Article VI, 1959 Antarctic Treaty (402 UNTS 71).

⁴⁰ The 1991 Environmental Protocol (30 ILM 1461) has been implemented to domestic legislation in e.g. the U.K. 1994 Antarctic Act and 1995 Antarctic Regulations (SI No.490); the U.S. 1996 Antarctic Environmental Protection Act; the Finnish 1996 Act on the Environmental Protection of Antarctica and the 1998 Decree on the Environmental Protection of Antarctica; the Norwegian 1995 Regulations Relating to Protection of the Environment in Antarctica; the Swedish 1992 Antarctic Act; and the New Zealand 1994 Antarctica (Environmental Protection) Act.

undertaken in the Antarctic Treaty area.⁴¹ This obligation is subsequently transposed into a direct obligation for tourist operators under municipal law: thus, in the U.K., for example, domestic legislation requires an environmental evaluation to be completed prior to a permit being granted for expeditions to the Antarctic area.⁴² In this sense, states are responsible for the actions of participants over which they have jurisdiction and must ensure that international obligations are satisfied.

States function as actors within international law in the sense that they regulate and manage participants within the national tourism industry, via their relevant municipal legal systems. This allows for around 190 states⁴³ to reach agreement on a specific issue, then subsequently to implement the operational mechanisms into each individual municipal system – as opposed to seeking the cooperation and agreement of an unidentifiable (and largely unmanageable) number of global tourism participants operating in the international arena.

However, there are some fundamental problems with the regulation of the tourism industry solely by states. First, satisfying international commitments or obligations relies on states implementing provisions into domestic law. Where a state consents to be bound by an international treaty, but subsequently fails to implement the requisite provisions into the national legal system, tourism participants are not *prima facie* subject to the

⁴¹ 1991 Environmental Protocol, Article 8 and Annex I.

⁴² 1994 Antarctic Act, sections 3 and 5; 1995 Antarctic Regulations (SI No.490), sections 4-6.

⁴³ The UN has 191 members, plus the Holy See, Cook Islands and Niue. See the UN website <<http://www.un.org/members/index.html>>.

international regulations.⁴⁴ The next problem, which is in some way connected with the first, relates to the effectiveness of using states as the primary international actor to regulate tourism activities. In the event of non-compliance by states (in respect of either breaching international obligations, or failing to transpose into municipal law), there often exists little in the form of international compliance mechanisms or penalty schemes. Finally, by directing regulatory attempts solely via states, as the primary subject of international law, there is no direct regulation in respect of arguably the most important participants in the tourism industry – that is, individuals, international organisations, multinational corporations, and non-governmental organisations. Accordingly, whilst the orthodox approach has been recognised and its merits acknowledged, significant pitfalls do exist in respect of adopting the traditional doctrine and relying only on states when addressing the global tourism industry.

⁴⁴ For an overview of the way in which states can consent to an international treaty see M.Fitzmaurice 'The Practical Working of the Law of Treaties' in M.Evans (ed.) *International Law* (Oxford: OUP, 2003). This can be illustrated by EC law where in some cases, member states either neglect to, or are tardy in, implementing new directives into national legislation. Where member states do not implement EC law into their domestic legal systems (either due to late/omitted transposition, incomplete/incorrect transposition, or incorrect application in practice), individual complaints can be made against the offending state, following which, the European Commission may take enforcement action. For further discussion on this issue, see e.g. L.Kramer *Focus on European Environmental Law* (London: Sweet & Maxwell, 1997 2nd edition) ch. 1.

2.2.2 Individuals

The 'individual' in international law⁴⁵ refers to a human being or 'natural person'.⁴⁶ Traditionally, individuals have been identified as 'objects' (or beneficiaries⁴⁷) of international law, rather than possessing status as 'subjects' in the international legal system.⁴⁸ This dichotomy allows for the actions of individuals to be controlled by international law – but it does not impose direct rights and responsibilities, or permit individuals to 'participate in the creation, development and enforcement of international law', in the same way that states can.⁴⁹ However, global developments in the international community have rendered this approach somewhat out-dated, with the result that scholars,⁵⁰ regional human rights courts,⁵¹ and the

⁴⁵ The individual in the international legal system has been the topic of much detailed analysis. Whilst only a relatively brief discussion is allowed for here, a more comprehensive account can be found in e.g.: R.McCorquodale 'The Individual and the International Legal System' in M.Evans (ed.) *International Law* (Oxford: OUP, 2003); Cassese, note 7, p. 142-150; A.Orakhelashvili 'The Position of the Individual in International Law' 31 *California Western International Law Journal* (2001) 241; A.Randelzhofer 'The Legal Position of the Individual under Present International Law' in A.Randelzhofer and C.Tomuschat (eds.) *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (The Hague: Kluwer, 1999); Higgins, note 5, p. 48-55; P.K.Menon 'The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine' 1 *Journal of Transnational Law and Policy* (1992) 151.

⁴⁶ The individual has, in some situations, been considered to extend to groups of natural persons such as non-governmental organisations (group of natural legal persons) or corporations (group of non-natural legal persons). See McCorquodale, note 45, p. 300. As both non-governmental organisations and corporations are examined independently below, the current discussion will focus on individuals as natural persons in the international legal system. Note that individuals may also collectively form part of civil society in general, however, the extent to which this applies to tourism is discussed independently below.

⁴⁷ A.Cassese *International Law in a Divided World* (Oxford: Clarendon, 1986) 99.

⁴⁸ Jennings and Watts, note 5, p. 16-18.

⁴⁹ McCorquodale, note 43, p. 300-301.

⁵⁰ The seminal scholar on this topic, Hersch Lauterpacht, argued that individuals were subjects of international law. His argument has subsequently been adopted by many modern academics. See e.g. Lauterpacht, note 16; McCorquodale, note 43; Orakhelashvili, note 45, p. 241.

⁵¹ Individuals have been accorded rights under *inter alia* the 1950 European Convention on Human Rights and the 1969 Inter-American Convention on Human Rights.

International Court of Justice,⁵² now recognise (to varying extents) individual legal personality in public international law.

Nonetheless, whilst the individual can be recognised as a partial subject of the international legal system, states remain the traditional subjects of international law.⁵³ Indeed, the merits of recognising ‘subjects’ and ‘objects’ of international law has been widely criticised: “the whole notion of ‘subjects’ and ‘objects’ has no credible reality ... and no functional purpose. We have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint”.⁵⁴ Instead international law should be viewed as a decision-making process, within which “there are a variety of participants, making claims across state lines, with the object of maximising various values”.⁵⁵ In this model, participants include individuals, states, international organisations, multinational corporations and NGOs.⁵⁶

Given the diverse nature of the global tourism industry and its numerous participants, a move away from the traditional subject-object dichotomy is an imperative development. Individual participants found within the global tourism industry notably include the tourists themselves, individual or small

⁵² *Reparation for Injuries, Advisory Opinion, ICJ Reports* (1949) 174 at 178-9; *Jurisdiction of the Courts of Danzig, Advisory Opinion* (1928) PCIL (Ser. B, No.15) 17-18.

⁵³ Members of the positivist school believe that individuals are the objects – not subjects – of international law. See R.Higgins ‘Conceptual Thinking About the Individual in International Law’ in R.Falks *et al* (eds.) *International Law: A Contemporary Perspective* (London: Boulder, 1985) 478.

⁵⁴ Higgins, note 5, p. 49.

⁵⁵ Higgins, note 5, p. 50.

⁵⁶ Whilst this school of thought is gaining popularity within international law, it still remains the unorthodox view. However, the nature and composition of the tourism industry requires an approach that allows all participants to be accountable and involved in the law-making process, as opposed to traditional areas of international law which needed

tour operators, and local communities affected by tourism development. These individual participants are directly responsible for a significant proportion of tourist activities (either as tourists themselves, or as operators facilitating the activities) and, consequently, the accompanying environmental damage. The traditional approach focuses attention on the actions of states, with participants such as individuals regulated indirectly where international law is implemented into municipal systems. However, the recognition of individual participants within the international legal system allows for tourism activities to be addressed in a direct and comprehensive manner, leading to a more effective environmental protection regime. The salient question then is – what rights and obligations exist in respect of these individuals under international law?

The rights of the individual within the international legal system predominately fit within the jurisprudence of international human rights law. Cased within this body of law is the notion that individuals may be able to assert a human right to a clean environment,⁵⁷ which would consequently allow those individuals affected – most likely in the form of local communities – to make a claim in international law in respect of tourism activities which have a degrading effect on the natural

only to contend with the actions of states (for example, issues regarding jurisdiction and state responsibility).

⁵⁷ On human rights and the environment generally, see B.Hill, S.Wolfson, N.Targ 'Human Rights and the Environment: A Synopsis and Some Predictions' 16(3) *Georgetown International Environmental Law Review* (2004) 359; M.Fitzmaurice 'Some Reflections on Public Participation in Environmental Matters as a Human Right in International Law' 2(1) *Non-State Actors and International Law* (2002) 1; A.Boyle and M.Anderson (eds.) *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon, 1996); P.Pevato 'A Right to Environment in International Law: Current Status and Future Outlook' 8(3) *RECIEL* (1999) 309; P.Sands 'Human Rights and International Environmental Law' *European Human Rights Law Review* (1996) 597; I.Hodkova 'Is There a Right to a Healthy Environment in the International Legal Order?' 7 *Connecticut Journal of International Law* (1991) 65.

environment.⁵⁸ Whilst there has been support for this 'emerging right',⁵⁹ it is unlikely that there currently exists an independent human right to a decent environment within customary international law.⁶⁰ However, environmental rights are very much a part of the international legal system, often being attached to other basic human rights,⁶¹ or occurring in the form of procedural rights. Most recently, such rights have been relied upon in an attempt to reduce increasing noise levels at London's Heathrow airport.⁶²

⁵⁸ Note the WTO included in its Global Code of Ethics a 'right to tourism', to be regarded as the corollary of the right to rest and leisure guaranteed by Article 24 of the Universal Declaration of Human Rights and Article 7.d of the International Covenant on Economic, Social and Cultural Rights. The WTO considers that the 'direct and personal access to the discovery and enjoyment of the planet's resources constitutes a right equally open to all the world's inhabitants' (Article 7, WTO Global Code of Ethics).

⁵⁹ E.g. Kiss and Shelton, note 8, ch. 15 (especially p.709-717); Boyle and Anderson, note 57, ch. 5; L.Sohn 'The Stockholm Declaration on the Human Environment' 14 *Harvard International Law Journal* (1973) 455. Also see Article 24, African Charter on Human and People's Rights; Article 11 Additional Protocol to the American Convention on Human Rights; Article 12 UN Covenant on Economic and Social Rights; and Principle 2, Draft Declaration of Principles on Human Rights and the Environment, proposed by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities.

⁶⁰ Birnie and Boyle, note 8, p. 254; D.Shelton 'Environmental Rights' in P.Alston *Peoples' Rights* (Oxford: OUP, 2001); G.Handl 'Human Rights and Protection of the Environment' in A.Eide, C.Krause and A.Rosas (eds.) *Economic, Social and Cultural Rights: A Textbook* (Dordrecht: M.Nijhoff, 2001 2nd edition); M.Fitzmaurice 'International Environmental Law as a Special Field' XXV *Netherlands Yearbook of International Law* (1994) 181 at 222.

⁶¹ For example, the right to life and the right to peaceful enjoyment of one's possessions were upheld in the ECHR case of *Öneriyildiz v. Turkey* (30 November 2004) where national authorities were held to be in part responsible for the deaths the applicant's close relatives and for the destruction of their property as a result of a methane explosion at the municipal rubbish tip in Ümraniye (Istanbul). Article 8 of the European Convention on Human Rights has also been held to guarantee the right to a healthy environment in *López Ostra v. Spain* (9 December 1994) and *Guerra and Others v. Italy* (19 February 1998), which concerned, respectively, nuisances (smells, noise and fumes) caused by a waste-water treatment plant close to the applicant's home, and harmful emissions from a chemical works which presented serious risks to the applicants, who lived in a nearby municipality.

⁶² In the case of *Hatton and Others v. The United Kingdom* (2 October 2001), the ECHR held that there had been a violation of Article 8 of the European Convention on Human Rights in that the applicants' enjoyment of their right to respect for their homes and their private and family lives had been comprised. This case was later referred to Grand Chamber where the decision was reversed and it was concluded – by 12 votes to five – that no violation of Article 8 had occurred (8 July 2003, paragraphs 116 – 130). However, in this case the dissenting judges (Costa, Ress, Türmen, Zupančič and Steiner) undertook extensive comment on the development of 'environmental human rights' and noted that the majority decision clearly deviates from established case law and 'runs counter to the growing concern over environmental issues all over Europe and the world' (paragraph 5). See also H.Post 'The Judgment of the Grand Chamber in *Hatton and Others v. the United Kingdom* or: What is Left of the 'Indirect Right to a Healthy Environment?'' 4(2) *Non-State Actors and International Law* (2004) 135.

One area where the individual increasingly has additional rights is within the international law regarding public participation.⁶³ Participatory rights include access to information, public consultation in planning and development, participation in decision-making, and access to environmental justice.⁶⁴ Rights establishing participation have been specifically recognised by the international community⁶⁵ and have also been integrated into many other global and regional agreements.⁶⁶ Notably, the individual is accorded rights in respect of gaining access to environmental information, participating in the planning, policies and decisions which affect the natural environment, and having access to justice in environmental matters.⁶⁷ These rights have significant implications for individual participants within the tourism industry. Individuals affected by tourism development may assert a right of participation in the planning and approval of such activities in order to ensure tourism is undertaken in accordance with the principles of sustainable development. This is especially relevant in respect of ecotourism, where the involvement and participation of local and indigenous communities is deemed an essential component of the ecotourism ideology.⁶⁸ Accordingly, states must ensure the involvement and appropriate participation of relevant stakeholders in the ecotourism

⁶³ For a discussion on public participation within the international legal system as a component of sustainable tourism, see *infra* Chapter 4 (4.3.2).

⁶⁴ For a discussion on public participation within international environmental law see e.g. A.Mathieson 'Public Participation in Decision-making and Access to Justice in EC Environmental Law: the Case of Certain Plans and Programmes' 12(2) *European Environmental Law Review* (2003) 36; J.Ebbesson 'The Notion of Public Participation in International Environmental Law' 8 *Yearbook of International Environmental Law* (1997) 51; Fitzmaurice, note 57; Boyle and Anderson, note 57.

⁶⁵ The 1998 UNECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (38 ILM 517). See the UNECE website <<http://www.unece.org/env/pp/>>.

⁶⁶ E.g., 1992 Rio Declaration, Principle 10; 1993 North American Agreement on Environmental Cooperation, Article 1(h).

⁶⁷ 1998 Aarhus Convention, Articles 4, 6, 7 and 9.

process, including the implementation of environmental impact assessment procedures.⁶⁹

The obligations on the individual in international law are mostly restricted to international criminal law and international humanitarian law, where individuals can be held responsible for offences against the international community.⁷⁰ However, there is an emerging idea that individuals may be responsible for a developing international obligation in respect of serious deliberate pollution (implementing the polluter pays principle) or held liable in accordance with civil liability regimes.⁷¹ The establishment of civil environmental liability regimes demonstrates that the international community recognises state responsibility to be not entirely effective as a sole means of addressing international environmental damage.⁷² Civil liability targets the private sector to ensure that preventative measures are adopted to avoid environmental harm and furthermore, ensure that the costs of any damage are met by the polluter.⁷³ Where tourism activities are caught under a civil liability regime, the operators (either individuals or tour

⁶⁸ The 2002 Quebec Declaration on Ecotourism states in its preamble that ecotourism 'includes local and indigenous communities in its planning, development and operation, and [contributes] to their well-being'.

⁶⁹ 2002 Quebec Declaration on Ecotourism, paragraphs 3 and 4.

⁷⁰ E.g. Cassese, note 7, ch. 21. However, note the Council of Europe Convention on the Protection of the Environment through Criminal Law (Strasbourg, 4.XI.1998) which attempts to introduce criminal liability in respect of environmental damage. This Convention merely offers guidance at present as its general provisions require states to adopt national measures to implement the agreement and moreover, it has not yet entered into force.

⁷¹ Fitzmaurice, note 60, p. 222.

⁷² B.Röben 'Civil Liability as a Control Mechanism for Environmental Protection at the International Level' in F.Morrison and R.Wolfrum (eds.) *International Regional and National Environmental Law* (The Hague: Kluwer, 2000).

⁷³ E.g. 1999 Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal (not yet in force); 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (25 ILM 1406); IAEA 1963 Vienna Convention on Civil Liability for Nuclear Damage (1063 UNTS 265); OECD 1960 Convention on Third Party Liability in the Field of Nuclear Energy (956 UNTS 251).

operator groups) become liable for environmental damage created as a result of their activities.⁷⁴ The introduction of such regimes has the result of increasing the threshold of environmental care in order to avoid financial penalties in the form of civil liability.

Whilst individuals have not traditionally been considered as the principal subjects within the international legal system (in the way that states are), there is increasing support for the recognition of rights and obligations of individuals – and a need to realign public international law towards the recognition of participants – in order to address the environmental threats posed by tourism. Most notably for the tourism industry, individuals are increasingly being accorded procedural rights, in the form of public participation, which allow individuals and local communities to become involved in the development process. In respect of corresponding international obligations on individuals, there appears to be a developing body of law to suggest that the polluter-pays principle is being employed in the form of civil liability regimes. Although this type of international obligation is still in its infancy, it possesses significant ramifications for the tourism industry which is prone to unrestricted development in ecologically sensitive areas.

⁷⁴ E.g. 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (32 ILM 1228); 1992 International Convention on Civil Liability for Oil pollution Damage (973 UNTS 3).

2.2.3 Multinational Enterprises

Multinational Enterprises (MNEs)⁷⁵ are playing an increasingly significant role in the international legal system, especially in respect of tourism. Recognised as a private economic organisation headquartered in one state (often developed), with operations abroad (often located in developing countries), multinational enterprises are often economically more powerful than many states.⁷⁶ Accordingly, principal features of MNEs include economic and political authority, transnational activities, and transactions with states and private companies.⁷⁷

Tourism represents an industry in which a plethora of multinational enterprises operate. Members of the World Travel and Tourism Council (WTTC)⁷⁸ include some of the largest multinational enterprises involved in the tourism industry.⁷⁹ By way of illustration, the Accor Group⁸⁰ incorporates hotels, travel agencies, restaurants and casinos, employing more than 158,000 people throughout 140 different countries.⁸¹ Moreover, in 2003 group turnover for Accor exceeded the total gross domestic product

⁷⁵ The terms 'multinational corporations', 'multinational enterprises', 'transnational corporations' (or other similar variations) are often used in an interchangeable manner. However, for present purposes, the term 'multinational enterprises' will be employed.

⁷⁶ J.Dine *The Governance of Corporate Groups* (Cambridge: CUP, 2000) at 151-152; T.Risse-Kappen *Bringing Transnational Relations Back In: Non-state Actors, Domestic Structures and International Institutions* (Cambridge: CUP, 1995) at 3; D.Arzt and I.Lukashuk 'Participants in International Legal Relations' in C.Ku and P.Diehl (eds.) *International Law: Classic and Contemporary Readings* (London: Lynne Rienner, 1998) at 166.

⁷⁷ Cassese, note 47, p. 103.

⁷⁸ The WTTC is a global forum comprising the leaders of 100 of the world's largest travel and tourism companies (most of which are transnational enterprises). See the website <<http://www.wttc.org/>>.

⁷⁹ WTTC members include airline companies (e.g. Emirates, Gulf Air, Qatar, American, Iberia), hotel groups (e.g. Hilton, Accor, Marriott, InterContinental), travel companies (e.g. Uniglobe, Opodo, Sabre, Octopustravel), and financial service companies (e.g. American Express, Global Refund, CIBC World Markets).

⁸⁰ See the website <<http://www.accor.com>>.

(GDP) for nearly half of the world's countries and was on par with the total GDP for Iceland, Latvia and Zimbabwe.⁸² The problems associated with regulating such large MNEs are compounded by factors such as 'economic leakage', whereby the money generated by these companies leaks out of the local communities where the tourism activities take place, and back to the MNE's centralised headquarters.⁸³

Another multinational enterprise to operate as a significant player in the global tourism industry is the Peninsular and Oriental Steam Navigation Company (P&O), incorporating *inter alia*, P&O ports, ferries and resorts.⁸⁴ In 1997, P&O Australia (a subsidiary of P&O UK) was contracted by the Indian government to build an international port at Vadhavan, in the Dahanu region of India. However, the ecologically fragile character of the region and the extensive local biological diversity (including particularly rich fishing grounds), meant that P&O's development plans posed a significant risk to the local environment. The ensuing debate surrounding the potential social and environmental consequences of the proposed port exposed concerns regarding the regulation of multinational enterprises – especially in the context of developing countries.⁸⁵ Accordingly, the fundamental

⁸¹ Accor has 13 different hotel brands (totalling nearly 4,000 hotels), in addition to travel agencies, catering and entertainment facilities (including casinos), chartered air travel enterprises, and rail companies. See the website <<http://www.accor.com>>.

⁸² Consolidated sales for the Accor Group for 2003 were approximately 8 billion US dollars (see the Accor website <http://www.accor.com/gb/finance/chiffres_cles/crc.asp>). For statistics on individual state's GDP, see the website <<http://www.worldbank.org/data/>>.

⁸³ For a discussion on the economic leakage principle, see Chapter One (1.3.2). For a more comprehensive discussion on tourism and economic leakage, see the UNEP Tourism Programme at <<http://www.uneptie.org/pc/tourism/sust-tourism/economic.htm>>.

⁸⁴ See the P&O Group website <<http://www.pogroup.com>>.

⁸⁵ O.Perez 'Reflections on an Environmental Struggle: P&O, Dahanu, and the Regulation of Multinational Enterprises' 15(1) *Georgetown International Environmental Law Review* (2002) 1; S.Bashir and N.Mabey *Can the OECD Guidelines Promote Responsible Cooperate Behaviour? An Analysis of P&O's Proposed Port in Dahanu, India* (WWF, 1998) available on the website <<http://www.oecd.org/dataoecd/9/49/2089920.pdf>>.

question is – to what extent are multinational enterprises, such as P&O, subject to provisions of international law?

Despite the transnational character and economic significance of these entities, MNEs have not yet been recognised as subjects of international law.⁸⁶ Instead, it is considered that the virtually unrestricted power available to many of the largest multinational enterprises should be kept under the control of states, who are cautious of such powerful and influential bodies having an autonomous role within the international legal system.⁸⁷ However, there are fundamental problems with neglecting to recognise the significance of such important players in the international legal system. Whilst it could arguably be accepted that MNEs should not directly participate in international law (indeed, multinational enterprises do not appear to have specifically sought international legal personality), the global character and economic capacity of such enterprises mean that their participation and accountability within the international legal system should be recognised.

There have been a number of situations where MNEs have been invited to participate (albeit, only in a preliminary fashion) in the international legal process.⁸⁸ Notably, the views of the business community and relevant multinational enterprises were considered in the negotiation of the 1987

⁸⁶ Shaw, note 5, p. 224-225; J.Dine 'Multinational Enterprises: International Codes and the Challenge of 'Sustainable Development'' 1 *Non-state Actors and International Law* (2001) 81 at 82-83; D.Arzt and I.Lukashuk 'Participants in International Legal Relations' in C.Ku and P.Diehl (eds.) *International Law: Classic and Contemporary Readings* (London: Lynne Rienner, 1998) at 166-167; Cassese, note 47, p. 103.

⁸⁷ J.Charney 'Transnational Corporations and Developing Public International Law' *Duke Law Journal* (1983) 748.

⁸⁸ *Ibid.* p. 762-773.

Montreal Protocol and the 1992 Climate Change Convention.⁸⁹ However, participation was restricted to that of observer status, with states retaining ultimate authority. Whilst MNEs constitute a significant voice in the international community and therefore, should be properly represented, concerns regarding an overabundance of international legal participants (making the legal system unmanageable) and the risk of powerful global enterprises hijacking public international law issues, means that the participation of multinational enterprises will remain limited.

It thus follows that the accountability of MNEs within the international legal system is problematic, largely owing to their lack of legal status. There are however, two options for attempting to regulate the actions of these enterprises. First, it is possible for MNEs to have indirect legal accountability via the responsibility of nation states under international law. 'Indirect liability occurs by holding states responsible for the behaviour of corporations'.⁹⁰ However, in order to ensure this is undertaken properly, obligations established in international agreements must be correctly implemented into national legal systems and moreover, such legal systems must also function effectively.⁹¹ This proves to be particularly problematic in respect of developing states, which often lack the requisite legal infrastructure to enforce obligations against MNEs operating in their jurisdiction. In such situations, an alternative approach may be to compel the (usually developed) host state to take measures so that 'parent companies would be liable for the way in which they exercise control over

⁸⁹ Sands, note 8, p. 115-117.

⁹⁰ Dine, note 86, p. 83.

their foreign subsidiaries'.⁹² Whilst locally registered subsidiaries may be subject to domestic regulatory regimes, the effectiveness of such an approach relies heavily upon the competency of national enforcement, meaning that an international approach targeting parent companies may be more comprehensive and efficient.

A second way in which MNEs may be regulated by the international legal system is via soft-law instruments.⁹³ The significant role played by multinational business and industry has been recognised and expounded by the international community in a variety of contexts.⁹⁴ Of particular note, the OECD Guidelines for Multinational Enterprises provide voluntary principles and standards for the responsible business conduct of MNEs.⁹⁵ The Guidelines call upon MNEs to 'take due account of the need to protect the environment ... and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.'⁹⁶ In particular, the Guidelines set out principles such as the provision of environmental information, consultation, precaution, and technology development, essentially requiring enterprises to adhere to many of the fundamental elements found within the sustainable development objective. The imposition of such standards and guidelines on tourism-focused MNEs

⁹¹ For a discussion of the problems associated with implementing international law into national legal systems see e.g. Shaw, note 5, ch. 4; M. Anderson and P. Galizzi (eds.) *International Environmental Law in National Courts* (London: BIICL, 2003).

⁹² Dine, note 86, p. 84; P. Muchlinski *Multinational Enterprises and the Law* (Oxford: Blackwell, 1995) 108-109.

⁹³ For an overview of soft-law in international environmental law, see e.g. Birnie and Boyle, note 8, p. 24-27.

⁹⁴ E.g. Agenda 21 describes strengthening the role of business and industry (chapter 30); the World Business Council for Sustainable Development (WBCSD) is a coalition of 170 international companies committed to sustainable development – see the WBCSD website <<http://www.wbcd.ch>>.

⁹⁵ The OECD MNE Guidelines are available on the OECD website <<http://www.oecd.org>>.

⁹⁶ OECD MNE Guidelines, chapter 5.

would make a significant contribution to the behaviour of global tourism businesses, which otherwise largely escape comprehensive international regulation.⁹⁷ However, the MNE Guidelines exhibit a notable weakness in that they are non-binding, and thus the relevant standards cannot be considered legally enforceable obligations within the international legal system. Moreover, the sustainable development requirement in international law remains a somewhat ambiguous commitment, with the result that MNEs could still argue for the prioritisation of economic interests over environmental sustainability.⁹⁸

The application of the MNE Guidelines to global tourism enterprises is clearly viable and offers one method for attempting to regulate tourism activities. However, there are fundamental problems with using the Guidelines as the primary vehicle for ensuring environmental protection, as was demonstrated when the development of P&O's proposed port in India was challenged.⁹⁹ First, in addition to the Guidelines being non-binding, they are only addressed to OECD States¹⁰⁰ – namely the 30 most economically developed States – therefore omitting those countries which would most benefit from such regulation.¹⁰¹ Furthermore, the institutional framework established within the Guidelines requires parties concerned

⁹⁷ See A.Kiss, D.Shelton and K.Ishibashi (eds.) *Economic Globalisation and Compliance with International Environmental Agreements* (The Hague: Kluwer Law International, 2003) ch.14.

⁹⁸ For a more comprehensive discussion on the problems of relying on the MNE Guidelines in respect of achieving sustainable development see e.g. Dine, note 86, p. 92-93.

⁹⁹ Bashir and Mabey, note 85.

¹⁰⁰ That is, the Guidelines are strictly only applicable to the OECD State parties, although it could be argued that OECD documents represent the views of the international community, albeit, a certain 'developed' part of that community.

¹⁰¹ Generally, it is more likely that developed states will have stricter national environmental regulations once the industrialisation process has been undertaken, with the result that developing countries may benefit from stronger international environmental

with a potential breach to complain via national contact points,¹⁰² which (as in the P&O situation) will most likely be hesitant in intervening in international disputes, especially when not directly affected.¹⁰³

Accordingly, MNEs can be seen to be addressed – to some extent – by elements of the international legal system, which clearly extends to the numerous multinational tourism enterprises. However, these regulation attempts remain fundamentally flawed and, whilst some efforts contribute to the overall regulation of tourism activities, there is by no means a comprehensively satisfactory regulatory system in place.

2.2.4 Non-Governmental Organisations

The emergence of non-governmental organisations (NGOs) can be traced back to eighteenth century, since which time they have continued to proliferate at an incredible rate.¹⁰⁴ However, reaching a unanimous position on what constitutes an NGO has proven to be a difficult task. In its broadest sense, NGOs include numerous types of organisations that are more-or-less independent of the state, including economic interest groups, racial, gender and religious groups, issue-orientated groups, public interest groups, and so on: 'the many types of associations of citizens and of non-state institutions

standards, as these may still be absent at the national level. For a list of OECD members, see the OECD website <<http://www.oecd.org>>.

¹⁰² National contact points are 'set up by participating countries for undertaking promotional activities, handling inquiries and for discussions with the parties concerned on all matters covered by the Guidelines': paragraph 1, Decision of the OECD Council (June 2000) regarding the OECD Guidelines for MNEs.

¹⁰³ Perez, note 85, p. 20.

¹⁰⁴ For a discussion on the history of NGO involvement see e.g. S.Charnovitz 'Two Centuries of Participation: NGOs and International Governance' 18 *Michigan Journal of International Law* (1997) 183; J.Gamble and C.Ku 'International Law – New Actors and

that some theorists view as the essential ingredients of the concept of civil society'.¹⁰⁵ Although there is no definitive legal agreement on exactly what constitutes an NGO, the most widely accepted understanding identifies organisations that are non-profit entities possessing a membership distributed throughout one or more countries, which undertake activities that represent the collective will of those members.¹⁰⁶

Whilst there has been some support for the proposition that the term 'civil society' is the emerging terminology for NGOs,¹⁰⁷ in fact, '[t]he category of 'international civil society' is broader than that of NGOs and covers a range of both organised and unorganised, alternative and complementary groupings'.¹⁰⁸ In recognising the importance of public participation in the international legal system, the UN has identified various partners within civil society (one of which is NGOs¹⁰⁹), but acknowledges that '...the

New Technologies: Centre Stage for NGOs?' 31(2) *Law and Policy in International Business* (2000) 221.

¹⁰⁵ H.Steiner and P.Alston *International Human Rights in Context* (Oxford: OUP, 2000 2nd edition) 939.

¹⁰⁶ E.g. A.Alkoby 'Non-state Actors and the Legitimacy of International Environmental Law' 3 *Non-state Actors and International Law* (2003) 23 at 30-32; J.Peel 'Giving the Public a Voice in the Protection of the Global Environment: Avenues for Participation by NGOs in Dispute Resolution at the European Court of Justice and World Trade Organisation' 12 *Colorado Journal of International Environmental Law and Policy* (2001)47 at 48; D.Otto 'Nongovernmental Organisations in the United Nations System: The Emerging Role of International Civil Society' 18(1) *Human Rights Quarterly* (1996) 107 at 110-111; Article 1, European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations (ETS No.124, Strasbourg, 24.IV.1986). The UN Charter addresses NGOs in Article 71, but does not define them.

¹⁰⁷ E.g. Charnovitz, note 104, p. 188; Gamble and Ku, note 104, p. 221. Note that 'civil society' appears to be preferred in international relations theory, where an all-encompassing approach is adopted to non-governmental entities. See e.g. B.Gemmill and A.Bamidele-Izu 'The Role of NGOs and Civil Society in Global Environmental Governance' in D.Esty and M.Ivanova *Global Environmental Governance: Options and Opportunities* (Yale: Yale School of Forestry & Environmental Studies, 2002).

¹⁰⁸ Charlesworth and Chinkin, note 27, p. 90.

¹⁰⁹ See the UN & Civil Society initiative at <http://www.un.org/partners/civil_society/home> and Resolution 1996/31 on the consultative relationship between the UN and non-governmental organisations (25 July 1996). Moreover, the UN document Agenda 21 recognises the roles and responsibilities of nine major groups of civil society, again, one of which is NGOs (the others being, women, children and youth, indigenous peoples, local authorities, workers and trade unions.

boundaries between the different categories are porous; some organisations could be put in multiple places'.¹¹⁰ In this chapter, discussion will be restricted to NGOs – as one part of civil society – and their function within the international legal system in respect of tourism.¹¹¹

NGOs have played a vital role in the development of international environmental law, and also, as it will transpire, in respect of the global tourism industry. The intensification of NGO involvement became apparent in the early 1970s, demonstrated by events such as the UN Stockholm Conference on the Human Environment, where NGOs (of which there were twice as many present as states) were permitted to make a formal statement at the conference.¹¹² Moreover, specialist NGOs have been established in order to address specific threats posed to certain natural environments. One such example, the Antarctic and Southern Ocean Coalition (ASOC) contains nearly 230 environmental NGOs throughout 49 countries and leads campaigns to protect the biological diversity and pristine wilderness of Antarctica, including its oceans and marine life.¹¹³ In particular, one of the main campaigns undertaken by the ASOC is in respect of Antarctic tourism, where the Coalition aims to convince members of the Antarctic Treaty

business and industry, scientific and technological committees, and farmers) at <<http://www.un.org/esa/sustdev/mgroups/mgroups.htm>>. For a discussion on the relationship between NGOs and the UN see Otto, note 106, p. 107.

¹¹⁰ UN Panel on Civil Society *The Diversity of Actors Within the UN System* available on the website <<http://un.org/reform/pdfs/categories.htm>>.

¹¹¹ In fact individuals and business enterprises, which may also in some circumstances form elements of civil society, are addressed separately in this chapter. The present discussion focuses on NGO's as a means of establishing a boundary for analysis.

¹¹² There were 113 governments and at least 225 accredited NGOs present at the conference. Also, note the similar role of NGOs at the subsequent Rio Conference on Environment and Development where more than 650 NGOs were involved (compared to 178 governments). See Charnovitz, note 104, p. 261-262.

¹¹³ See the website of the ASOC <<http://www.asoc.org/index.htm>>.

System¹¹⁴ to implement meaningful regulation.¹¹⁵ The ASOC attends the annual Antarctic Treaty Consultative Meetings (ATCM) as an expert non-consultative party where it participates by submitting papers to the Treaty parties for consideration, and by providing advice to Parties on various expert topics.¹¹⁶ During the 1980s the ASOC undertook a successful campaign opposing the extraction of mineral resources in the Antarctic continent¹¹⁷ and, furthermore, continues to be active in promoting the implementation of the Environmental Protocol, guarding the Southern Ocean fisheries, and promoting the regulation of Antarctic tourism. The role such NGOs play in respect of providing research and demanding accountability is a vital function in the wider context of the international legal system.

Another organisation to demonstrate considerable influence over the international environment is the World Conservation Union (IUCN).¹¹⁸ More akin to a hybrid organisation than a traditional NGO, the IUCN comprises more than 1,000 members, made up from national and

¹¹⁴ The Antarctic Treaty System (ATS) refers to the international agreements concluded in respect of Antarctica. There are currently 27 consultative parties to the ATS, and a further 17 non-consultative parties. For an overview of the ATS see e.g. A. Watts *International Law and the Antarctic Treaty System* (Cambridge: Grotius, 1992).

¹¹⁵ Details of the ASOC's tourism campaign are available on the website <http://www.asoc.org/what_tourism.htm>.

¹¹⁶ The ASOC also regularly attends the annual meetings for the Convention on the Conservation of Antarctic Marine Living Resources, the International Whaling Commission, the Convention on International Trade in Endangered Species, as well as other events such as the 2002 World Summit on Sustainable Development, and the 2004 Antarctic Treaty Meeting of Experts on Tourism and Non-governmental Activities in Antarctica. For further information on the papers presented at these meetings, see the ASOC website <http://www.asoc.org/meetings_other.htm>.

¹¹⁷ A mining regime was provided for under the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities, however, the treaty never entered into force. See e.g. L. Kimball 'Environmental Law and Policy in Antarctica' in P. Sands (ed.) *Greening International Law* (London: Earthscan, 1993); C. Joyner 'The Antarctic Minerals Negotiating Process' 81 *AJIL* (1987) 888.

¹¹⁸ For an overview of the IUCN see Birnie and Boyle, note 8, p. 67-68.

international NGOs, government agencies, states, and affiliate members.¹¹⁹ Much of the policy and technical advice produced by the IUCN is generated by specialist commissions, one of which is the World Commission on Protected Areas (WCPA).¹²⁰ A dedicated task force on tourism and protected areas provides expert guidance and develops management guidelines to be applied to tourism planners and managers.¹²¹ Notably, the WCPA addressed the environmental issues surrounding tourism by establishing guidelines for planning and management of sustainable tourism in protected areas.¹²² The main objective of the guidelines is to provide those in the tourism industry with advice and management guidance on how to develop tourism activities in a sustainable manner, particularly in respect of protected areas.¹²³ Concluded as a management-styled handbook, the guidelines outline many of the basic common conservation principles, such as planning and stakeholder consultation,¹²⁴ visitor management,¹²⁵ and environmental monitoring.¹²⁶

Finally, the World Travel and Tourism Council represents an industry-based NGO operating within the tourism sector.¹²⁷ The mission of the WTTC is to

¹¹⁹ IUCN currently has 76 State members, 114 Government agencies, 735 national NGOs, 77 international NGOs, and 33 affiliate members. Despite its unique membership, the IUCN is still broadly considered an NGO given the make-up of its members and the nature of the work it undertakes. For further membership details see the IUCN website <<http://www.iucn.org/members/Mem%20Statistics.htm>>.

¹²⁰ The other IUCN commissions are: the Species Survival Commission; the Commission on Environmental Law; the Commission on Education and Communication; the Commission on Environment, Economic and Social Policy; and the Commission on Ecosystem Management.

¹²¹ See the Tourism and Protected Areas task force's website <<http://www.iucn.org/themes/wcpa/theme/tourism/tourism.html>>.

¹²² P.Eagles, S.McCool and C.Haynes *Sustainable Tourism in Protected Areas: Guidelines for Planning and Management* (Gland: IUCN, 2002).

¹²³ For a discussion on what IUCN considers to be 'protected areas' see *ibid.* p. 5-12.

¹²⁴ *Ibid.* ch. 4.

¹²⁵ *Ibid.* ch. 7.

¹²⁶ *Ibid.* ch. 11.

¹²⁷ See the website of the WTTC at <<http://www.wttc.org/>>.

raise awareness of the economic and social contribution of travel and tourism and to 'work with governments on policies that unlock the industry's potential to create jobs and generate prosperity'.¹²⁸ Members include industry representatives who share a vision to address issues which impact on the tourism industry and provide an effective voice for the industry in its dialogue with governments around the world.¹²⁹ Whilst primarily focused on promoting the economic development of the tourism industry, the WTTC (in its strategic framework *Blueprint for New Tourism*)¹³⁰ identifies the importance of balancing economics with the environment, people and culture.¹³¹ The goal of long-term sustainability is clearly a factor promoted by the WTTC, but the reality of the situation sees issues pertaining to the environment dwarfed by economic-orientated incentives.¹³²

Although NGOs are not recognised as traditional subjects of international law, they do play an important role in the international legal system in contributing to the development of the legal process and operating as monitoring organisations to ensure compliance with international commitments.¹³³ In the environmental field, NGOs are often particularly active in the preliminary research and drafting of international agreements,

¹²⁸ WTTC *Progress and Priorities 2004/05* (20 March 2004, WTTC) 1.

¹²⁹ *Ibid.* A list of WTTC members is available on the WTTC website <<http://www.wttc.org/framesetmembers.htm>>.

¹³⁰ WTTC *Blueprint for New Tourism* (18 September 2003, WTTC).

¹³¹ For example, see case-studies of the 'Blueprint for New Tourism' which address conservation-based tourism and recreational activities which raise environmental awareness on the WTTC website <<http://www.wttc.org/framesetmembers.htm>>.

¹³² WTTC, note 130, p. 8-9.

¹³³ McCorquodale, note 45, p. 317-320; Charnovitz, note 104, p. 188-189; Sands, note 17, p. 412-413. Note that legal personality of NGOs has been recognised in limited situations, such as the European Convention on the Recognition of the Legal Personality of International Non-governmental Organisations (ETS No. 124, Stratsbourg, 24.IV.1986), Article 3.

providing vital motivation and support for state parties.¹³⁴ Furthermore, NGOs informally participate in the law-making process by monitoring and enforcing states' obligations.¹³⁵ In this way, NGOs provide an alternative voice to states, offering expertise, grass-root perceptions, independence and accountability to the international legal system, in a way that states are often incapable of doing.¹³⁶

Because the threat posed to the environment by tourism activities is real and apparent, this makes for an opportune subject for NGO attention. To date, NGOs have been active in addressing the tourism industry in research, implementation and monitoring roles, thereby contributing to the overall international law-making process.

2.2.5 International Organisations

International organisations are commonly identified as entities comprising states (and sometimes other international organisations), established under international law.¹³⁷ Often created by agreement in treaty form, an

¹³⁴ In respect of bird protection see M.Bowman 'International Treaties and the Global Protection of Birds' 11(1) *JEL* (1999) 87 and 11(2) *JEL* (1999) 281; regarding climate change negotiations see C.Giorgetti 'The Role of Non-governmental Organisations in the Climate Change Negotiations' 9 *Colorado Journal of International Environmental Law and Policy* (1998) 115. For a discussion on the role of NGOs in the development of international law in general see K.Anderson 'The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organisations and the Idea of International Civil Society' 11(1) *EJIL* (2000) 91.

¹³⁵ A.Alkoby 'Non-state Actors and the Legitimacy of International Environmental Law' 3 *Non-state Actors and International Law* (2003) 23 at 32- 36; H.Cullen and K.Morrow 'International Civil Society in International Law: The Growth of NGO Participation' 1 *Non-state Actors and International Law* (2001) 7 at 17-19; Sands, note 17, p. 415-416.

¹³⁶ Cullen and Morrow, *ibid.*, p. 32-37.

¹³⁷ For an overview of international organisations in the international legal system see e.g. D.Akande 'International Organisations' in M.Evans (ed.) *International Law* (Oxford: OUP, 2003); P.Sands and P.Klein (eds.) *Bowett's Law of International Institutions* (London: Sweet & Maxwell, 2001 5th ed); G.Loibl 'The Role of International Organisations in International Law-making International Environmental Negotiations – an Empirical Study'

international organisation must demonstrate autonomy distinct from that of its members, so that it can adopt norms that are then addressed to those members.¹³⁸ Usually an international organisation will comprise a permanent secretariat, an assembly in which all members can participate, and a governing body of selected members undertaking managerial tasks.¹³⁹ The role of international organisations in the international community is extensive, including, providing a forum for debating matters of common interest, developing and adopting rules, and dispute resolution; providing an international vehicle for taking action on common interests; creating a mechanism for monitoring and supervising compliance with rules; and collecting and disseminating information regarding common policies and practices.¹⁴⁰ The legal personality of international organisations has received considerable attention, with the current view being that international organizations are subjects of international law, although unlike states, they do not possess a general competence.¹⁴¹ Instead, '[i]nternational organizations are governed by the 'principle of speciality', that is to say, they are invested by the states which create them with powers, the limits of which are a function of the common interests whose promotion those states entrust to them.'¹⁴² However, whilst it is accepted that international organisations *may* have personality, certain criteria must be established in order to satisfy the requirements for legal status of organisations in international law. The International Court of Justice concluded that the

1 *Non-State Actors and International Law* (2001) 41; C.Amerasinghe *Principles of the Institutional Law of International Organisations* (Cambridge: CUP, 1996); N.White *The Law of International Organisations* (Manchester: MUP, 1996).

¹³⁸ Akande, *ibid.*, p. 270; Sands and Klein, *ibid.*, p. 16.

¹³⁹ Cassese, note 7, p. 137.

¹⁴⁰ Akande, note 137, p. 270.

¹⁴¹ Akande, note 137, p. 272-275.

legal personality of international organisations requires the satisfaction of a two-fold test: namely, that the founding members intended to discharge to the organisation certain functions, duties and responsibilities, and secondly, the organisation enjoys effective autonomy from its member states.¹⁴³ The confirmation that an international organisation possesses legal personality leads to corresponding rights and obligations within the international legal system, notably that an international organisation can bring a claim in international law, has the right to enter into international agreements, and enjoys immunity from the jurisdiction of national state courts.¹⁴⁴

International organisations play an important role both in respect of environmental protection, and within the global tourism industry. The United Nations represents the most prominent international organisation, which, together with its numerous subsidiary bodies, makes a significant contribution to the international governance of the natural environment and its resources.¹⁴⁵ The extent to which the UN and its associated bodies impact on the global tourism industry is examined in detail below.¹⁴⁶ Moreover, the World Tourism Organisation now represents the largest and most influential international organisation in respect of the global tourism industry and the mechanics of this organisation will accordingly also be explored in detail.

¹⁴² Paragraph 25, *Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Reports (1996) 66.

¹⁴³ *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949) 174.

¹⁴⁴ Cassese, note 7, p. 137-138.

¹⁴⁵ For an overview of international organisations and environmental protection see e.g. Birnie and Boyle, note 8, ch. 2; Loibl, note 137, p. 41; White, note 137, ch. 10.

¹⁴⁶ See *infra* 2.3.

2.3 The United Nations and Global Tourism Initiatives

Arguably, the most significant global institution within the international legal system is the United Nations (UN) organisation.¹⁴⁷ The multifarious purposes of the UN include the maintenance of international peace and security, the development of friendly relations amongst states, and the achievement of international cooperation in solving international problems of an economic, social, cultural, or humanitarian character.¹⁴⁸ It is in respect of the last of these that the UN addresses issues surrounding the protection of the global environment.¹⁴⁹ The creation of the United Nations Environment Programme (UNEP)¹⁵⁰ in 1972 was intended to 'provide leadership and encourage partnership in caring for the environment by inspiring, informing, and enabling nations and peoples to improve their quality of life without compromising that of future generations'.¹⁵¹ Since its inception, UNEP has played a vital role in the development of the international legal system (in terms of both soft and hard law) addressing global environmental concerns. The United Nations contributes to the international legal process in a number of ways, most notably by promoting

¹⁴⁷ For a more detailed description of the United Nations system see e.g. N.White *The United Nations System: Towards International Justice* (London: Lynne Rienner, 2002); Sands and Klein, note 137, ch. 2; B.Conforti *The Law and Practice of the United Nations* (London: Kluwer, 2000, 2nd edition); P.Baehner and L.Gordenker *The United Nations at the End of the 1990s* (London: Macmillan, 1999, 3rd edition); R.Wolfrum (ed.) *United Nations: Law, Policies and Practice* (Dordrecht: M.Nijhoff, 1995); Higgins, note 5, ch. 10. The structure of the UN is shown by way of an organisational chart on the UN website <<http://www.un.org/aboutun/chartlg.html>>.

¹⁴⁸ Charter of the United Nations, Article 1. For a discussion on the UN Charter see B.Simma (ed.) *The Charter of the United Nations: A Commentary* (Oxford: OUP, 2002).

¹⁴⁹ The environment is not specifically mentioned in the UN Charter. However, the UN has undertaken significant work in respect of environmental protection, deriving its mandate from the social and humanitarian issues described in Article 1(3) of the Charter. For an overview of the UN's environmental work, see e.g. White, note 147, ch. 10; V.Nanda 'Environment' in O.Schachter and C.Joyner (eds.) *United Nations Legal Order* (vol.2) (Cambridge: CUP, 1995).

¹⁵⁰ GA Resolution 2997 (XXVII), 15 December 1972.

¹⁵¹ See the UNEP website <<http://www.unep.org/>>.

the development of international law,¹⁵² settling international disputes,¹⁵³ establishing international resolutions and recommendations,¹⁵⁴ and facilitating international conferences in order to explore global issues.¹⁵⁵ Moreover, the UN has acknowledged the relationship between tourism and the natural environment on numerous occasions, in both an international and regional context.¹⁵⁶ There are, however, two UN bodies that have specific programmes devoted to tourism and the natural environment – the Commission on Sustainable Development and the UNEP Tourism programme – each of which will now be examined.

2.3.1 Commission on Sustainable Development

The Commission on Sustainable Development (CSD) is a functional commission of the UN Economic and Social Council, created to ensure effective follow-up to the 1992 UN Conference on Environment and Development (UNCED). Operating as a high level forum on sustainable development, the core function of the CSD is to monitor and report on the

¹⁵² Article 13, UN Charter provides for the establishment of the International Law Commission (ILC) which is involved in the preparation of drafts on topics of international law. See the website of the ILC <<http://www.un.org/law/ilc/>>.

¹⁵³ The International Court of Justice (ICJ) represents the main way in which international disputes are addressed, operating as the principal judicial organ of the United Nations. See the ICJ website <<http://www.icj-cij.org/>>.

¹⁵⁴ Whilst the resolutions concluded by the General Assembly do not constitute international law *per se*, the resolutions represent the common views of the member states of the UN and thus, often reflect the opinion of the international community. For example, the UN General Assembly Resolution 37/7 on a World Charter for Nature, 28 October 1982.

¹⁵⁵ E.g. the 1972 UN Conference on the Human Environment (Stockholm) and the 1992 UN Conference on Environment and Development (Rio).

¹⁵⁶ There are numerous occasions where UN bodies have addressed the relationship between tourism and the environment, not all of which there is capacity to explore here. However, for example, the UN has addressed tourism (at the international level) by co-facilitating the International Year of Ecotourism; examining the impact of tourism on mountains during the UN International Year of the Mountains; and (at the regional level) the UN Economic and Social Commission for Asia and the Pacific has a dedicated 'Tourism and Transport Division'; the UNEP Caribbean Regional Co-ordinating Unit contains specific sustainable tourism initiatives.

UNCED agreements at the local, national, regional and international levels.¹⁵⁷ In particular, the CSD focuses on a specified number of sustainable development issues, working to promote their development and implementation.¹⁵⁸

Despite not being discussed in Agenda 21,¹⁵⁹ one of the key issues to which the CSD has turned its attention is sustainable tourism.¹⁶⁰ The CSD recognises the relationship between tourism and environmental protection, acknowledging the potentially adverse environmental impacts the tourism industry produces.¹⁶¹ The CSD identifies particularly problematic areas such as coastal area development, waste disposal, and the availability of fresh water, in response to which it advocates the involvement of all stakeholders within the tourism process and, furthermore, endorses the promotion of self-regulation and voluntary initiatives.¹⁶² Policy recommendations are made for the tourism industry, national governments, NGOs, and the international community, reiterating many basic

¹⁵⁷ The UNCED agreements include the Framework Convention on Climate Change, the Convention on Biological Diversity, Agenda 21, the Rio Declaration, and the Forest Principles. The initial mandate and functions of the CSD as set out in General Assembly Resolution 47/191, 29 January 1993. See the CSD website <<http://www.un.org/esa/sustdev/csd>>.

¹⁵⁸ The sustainable development issues targeted by the CSD are detailed on the CSD website <<http://www.un.org/esa/sustdev/sdissues/sdissues.htm>>.

¹⁵⁹ Many of the sustainable development issues targeted by the CSD were highlighted in Agenda 21. During the 19th Special Session of the General Assembly, it was considered that there is a need to consider further the importance of tourism in the context of Agenda 21 (23-27 June 1997).

¹⁶⁰ Details of the CSD's programme addressing sustainable tourism are available on the CSD website <<http://www.un.org/esa/sustdev/sdissues/tourism/tourism.htm>>.

¹⁶¹ In exploring the relationship between tourism and sustainable development the CSD also explores issues related to economic and social development. See the Report of the Secretary-General for the 7th Session of the Commission on Sustainable Development (E/CN.17/1999/5) 15 January 1999, and its three addenda on economic development, social development and environmental protection.

¹⁶² E.g. WTTC Guidelines, the Green Globe programme, the International Hotel Environment Initiative, and the Blue Flag Programme. Report of the Secretary-General for the 7th Session of the Commission on Sustainable Development (E/CN.17/1999/5) 15 January 1999, paragraphs 54-67.

environmental principles.¹⁶³ However, the CSD does recognise several important emerging issues with regard to tourism and environmental protection.¹⁶⁴ Notably, the development of partnerships for sustainable tourism between stakeholders is encouraged, along with the involvement of the banking and insurance sectors in order to incorporate environmental and social criteria into assessment procedures for loans, investments, and insurance.¹⁶⁵ More specifically, the CSD recognises the continuing development of long-haul travel and the cruise ship industry and recommends greater attention to the environmentally sustainable development of technologies supporting these activities.¹⁶⁶

The CSD emphasises the importance of recognising the major participants within the tourism industry and coordinating their actions, in particular those of the World Tourism Organisation, the International Maritime Organisation and the conference of the parties to the Convention on Biological Diversity.¹⁶⁷ Finally, the CSD recognises the particular vulnerability of ecotourism environments and small island developing states, as a result of rapidly increasing tourist numbers and undeveloped infrastructure. Again, increasing the availability of finance and promoting capacity-building (in respect of ecotourism) and integrated, environmentally conscious tourism planning (in respect of small island developing states) are

¹⁶³ Report of the Secretary-General for the 7th Session of the Commission on Sustainable Development, 15 January 1999: Addendum Tourism and Environmental Protection (E/CN.17/1999/5/Add.3). Many of the recommendations refer to capacity-building, raising awareness, participation, monitoring and technology development.

¹⁶⁴ *Ibid.*, paragraph 23.

¹⁶⁵ *Ibid.*, paragraph 23(a) & (b).

¹⁶⁶ *Ibid.*, paragraph 23(f) & (g).

¹⁶⁷ Decision 7/3 on Tourism and Sustainable Development at the 7th Session of the Commission on Sustainable Development, 19-30 April 1999.

seen as offering a possible palliative to the problems facing the natural environment.¹⁶⁸

2.3.2 UNEP Tourism Programme

UNEP undertakes numerous activities as part of its environmental mandate.¹⁶⁹ The Production and Consumption Branch represents one such activity, which focuses on the promotion of more sustainable forms of industrial development.¹⁷⁰ One of the sectors targeted by the UNEP Production and Consumption Branch is tourism,¹⁷¹ whereby the UNEP Tourism Programme (UNEP Tourism) strives to ensure that 'conservation (through sustainable management and use) of the natural, cultural and man-made environment is an integral part of all tourism development'.¹⁷²

By way of guidance, UNEP Tourism has concluded a set of 'Principles on the Implementation of Sustainable Tourism' to aid the integration of sustainable tourism into practice, to facilitate the development of more specific guidelines, and to offer a framework for international agreements that address tourism issues.¹⁷³ In particular, the Principles address the

¹⁶⁸ Report of the Secretary-General on the Sustainable Development of Tourism, for the CSD acting as the preparatory committee for the World Summit on Sustainable Development, 2 March 2001 (E/CN.17/2001/PC/21), paragraphs 17-19.

¹⁶⁹ UNEP focuses on issues such as: atmosphere; biodiversity; business and industry; chemicals; civil society and public; energy; environmental assessment; freshwater; governance and law; land; marine and coastal areas; and urban issues. See the UNEP website <<http://www.unep.org/>>.

¹⁷⁰ See the UNEP Production and Consumption Branch website <<http://www.uneptie.org/pc/home.htm>>. The Production and Consumption Branch is part of the larger UNEP Division of Technology, Industry and Economics, see the UNEP DTIE website <<http://www.uneptie.org/home.html>>.

¹⁷¹ Other sectors include mining, agri-food, oil and gas, and industrial estates.

¹⁷² UNEP Tourism Programme 'mission statement' see <<http://www.uneptie.org/pc/tourism/about-us/mission-strategies.htm>>.

¹⁷³ The principles are available in full on the UNEP Tourism website <<http://www.uneptie.org/pc/tourism/policy/principles.htm>>.

integration of tourism into sustainable development policy,¹⁷⁴ the planning and development of sustainable tourism,¹⁷⁵ strengthening institutional frameworks and environmental standards,¹⁷⁶ and the management of tourism, including monitoring, technology, information exchange and capacity building.¹⁷⁷ The Principles offer guidance and support for governments and the private sector, but as they lack any binding legal status, adherence to each principle remains voluntary.

The UNEP Tourism Programme focuses much of its work on promoting private sector initiatives, largely by assisting trade associations, business development institutions, corporations and entrepreneurs to incorporate the sustainability principle into their economic activities. The main vehicle used by UNEP for promoting such relationships is the Tour Operators' Initiative for Sustainable Tourism Development (TOI), for which UNEP Tourism operates as Secretariat.¹⁷⁸ A voluntary body comprising leading tourism companies,¹⁷⁹ the TOI encourages tour operators to make a corporate commitment to sustainable development.¹⁸⁰ However, the

¹⁷⁴ *Ibid.*, principle 1.

¹⁷⁵ *Ibid.*, principle 2.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*, principles 3 and 4.

¹⁷⁸ See the website of the Tour Operators' Initiative at <<http://www.toinitiative.org/>>. Note that UNEP Tourism is also involved in a number of other partnership programmes including: the UNEP/UNESCO/Rare Centre World Heritage Site Project; a partnership with the Rainforest Alliance, International Ecotourism Society and Institute of Policy Studies; and alongside the International Coral Reef Action Network. For further details on these activities see the UNEP Tourism website <<http://www.uneptie.org/pc/tourism/about-us/activities.htm>>.

¹⁷⁹ The membership of the Tour Operators' Initiative totals 22 companies (see the list of current members at <http://www.toinitiative.org/about/members.htm>). Some consolidation that so few companies belong to the Tour Operators' Initiative may be sought from the fact that the Initiative was only launched in March 2000. However, at its inception 15 tour operators committed themselves to the Initiative, meaning that there have been few new subsequent subscriptions.

¹⁸⁰ All members must sign the statement of commitment to sustainable tourism development, see the TOI website <http://www.toinitiative.org/about/statement_of_commitment.htm>.

'principles of sustainable development and management of tourism' advocated by the TOI represent vague ideas of general corporate social responsibility, lacking any substantive detail or conviction.¹⁸¹ Whilst the notion of corporate social responsibility does possess many merits (for example in respect of planning, risk assessment, performance indicators, and reporting),¹⁸² the small number of participants and lack of any substantive commitments mean that the TOI is currently of little practical effect.¹⁸³

UNEP Tourism also works with the private sector by promoting voluntary initiatives aimed at achieving environmentally sustainable tourism.¹⁸⁴ Identified as a voluntary commitment (or agreement) that goes beyond existing environmental laws and regulations, voluntary initiatives include tools such as tourism eco-labels¹⁸⁵ and codes of conduct.¹⁸⁶ Furthermore, there are additional generic voluntary initiatives which may also apply to tourism, although not specifically created in respect of tourist activities. The UN Global Compact is a voluntary corporate citizenship network in

¹⁸¹ The most compelling principle is a commitment to a 'continual attempt to improve our performance in the context of sustainable development and management of tourism' (2.4). whilst, more generally, companies agree to 'strive to pursue the best practices in all our activities' (2.6), and 'encourage our partners, suppliers and sub-contractors to improve their contribution to sustainable development and management of tourism' (2.7). Perhaps the most encouraging commitment for future successes is that companies agree to 'develop these principles into a corporate policy...as part of this we will define measurable goals, and will monitor and report publicly on our progress' (2.10). The principles are available in full on the TOI's website

<http://www.toinitiative.org/about/statement_of_commitment.htm>.

¹⁸² ABTA, TOI and Tearfund *Improving Tour Operator Performance: The Role of Corporate Social Responsibility and Reporting* (November 2002) available on the TOI website <<http://www.toinitiative.org/about/about.htm>>.

¹⁸³ Note that the TOI has recently published a set of case studies contributed by member organisations: *TOI Sustainable Tourism: The Tour Operator's Contribution* (UNEP, 2003).

¹⁸⁴ See the UNEP Tourism website on voluntary initiatives at <http://www.unep-tie.org/pc/tourism/private_sector/about-vi.htm>.

¹⁸⁵ UNEP *Ecolabels in the Tourism Industry* (Paris: UNEP, 1998).

¹⁸⁶ UNEP *Voluntary Industry Codes of Conduct for the Environment* (Paris: UNEP, 1998).

which participating organisations¹⁸⁷ agree to promote the nine specified principles relating to human rights, labour and the environment.¹⁸⁸ Also, the Global Reporting Initiative collaborates with UNEP to act as a multi-stakeholder process and independent institution, whose mission it is to 'develop and disseminate globally applicable Sustainability Reporting Guidelines'.¹⁸⁹ Companies agreeing to comply with the Guidelines disclose the organisation's economic, environmental and social performance in accordance with generally accepted framework, inevitably leading to higher levels of credibility, consistency, and comparability.¹⁹⁰

UNEP Tourism confronts important challenges posed by the tourism industry and utilises its global competence to address these problems. In focusing on the participants of the tourism industry (primarily private organisations and corporations), UNEP Tourism is able to address the actors directly responsible for threatening environmental degradation. However, whilst the UN is (quite possibly) the foremost organisation within the international community, the initiatives in which UNEP Tourism participate remain devoid of any legally binding effect. Thus, whilst the initiatives offer valuable practical advice regarding the behaviour of private tourism bodies, their applicability remains entirely voluntary. It is important to acknowledge that the voluntary character of such initiatives and the

¹⁸⁷ There are approximately 1,700 participants, of which 20 identify as belonging to the 'tourism and leisure' sector. See the Global Compact website <<http://www.unglobalcompact.org/>>.

¹⁸⁸ Three of the nine UN Global Compact principles relate to the environment, namely (Principle 7) Businesses should support a precautionary approach to environmental challenges, (Principle 8) undertake initiatives to promote greater environmental responsibility, and (Principle 9) encourage the development and diffusion of environmentally friendly technologies. See the Global Compact website <<http://www.unglobalcompact.org/>>.

¹⁸⁹ See the Global Reporting Initiative website <<http://www.globalreporting.org/index.asp>>.

consequent absence of any enforcement mechanisms often result in a reduction of their practical impact.

2.4 World Tourism Organisation

Tourism has established itself as the foremost industry in many countries and, globally, it represents the fastest growing economic sector in terms of foreign exchange and job creation.¹⁹⁰ In addition to the economic ramifications associated with tourism, there are also many social and environmental consequences which similarly require global attention and some form of regulation. One international response to this has been the creation of the World Tourism Organisation.¹⁹²

The International Congress of Official Tourist Traffic Associations was established in 1925, although changes were made to the Organisation as early as the 1940s, which resulted in a transformation into a technical NGO (representing both public and private groups), and a re-branding as the International Union of Official Travel Organisations (IUOTO). However, limitations on the operational capacity of the Organisation (largely attributable to its characteristics as an NGO) became increasingly apparent during the 1960s and as a consequence, the UN General Assembly passed a

¹⁹⁰ The 2002 Sustainability Reporting Guidelines are available on the GRI website <<http://www.globalreporting.org/guidelines/2002.asp>>.

¹⁹¹ The WTO publishes a considerable body of data regarding tourism statistics and analysis on inbound tourism (tourist arrivals, tourism receipts, travel by purpose and mean of transport), outbound tourism (outbound tourism by region of origin and tourism expenditure), as well as WTO's long-term prospects. See the WTO website <http://www.world-tourism.org/market_research/facts/menu.html>.

¹⁹² There are a number of international initiatives addressing issues related to the tourism industry (for example, the business-orientated World Travel and Tourism Council and the NGO, Tourism Concern), however, the World Tourism Organisation represents the largest

resolution converting the IUOTO into an intergovernmental organisation in 1969 and, furthermore, establishing operational links between the United Nations and the transformed Organisation.¹⁹³ This re-invention was further elaborated on in the text of the 'Statutes of the World Tourism Organisation', concluded by the General Assembly of the IUOTO which also launched the Organisation under its present-day title.¹⁹⁴

The World Tourism Organisation (WTO)¹⁹⁵ is structured around a *General Assembly*, responsible for budget approval, work programmes and debating topical tourism issues,¹⁹⁶ and the *Executive Council*, which operates as the Organisation's governing board.¹⁹⁷ In addition, there are six *regional commissions* focusing on the specific tourism issues occurring in each region,¹⁹⁸ *specialised committees* advising on management and programme content,¹⁹⁹ and a *Secretariat* to implement the Organisation's programme of work.²⁰⁰ Membership comprises Full Members (open to all sovereign states),²⁰¹ Associate Members (including territories not responsible for their

and most universally recognised organisation representing the international tourism industry.

¹⁹³ UNGA Resolution 2529 (XXIV) Establishment of an Intergovernmental Tourism Organisation, 5 December 1969.

¹⁹⁴ Statutes of the World Tourism Organisation, adopted by the Extraordinary General Assembly of the IUOTO, 27 September 1970, Mexico City.

¹⁹⁵ The World Tourism Organisation shares the same abbreviated title as the World Trade Organisation. For the purpose of this thesis, WTO shall refer to the World Tourism Organisation.

¹⁹⁶ Statutes of the World Tourism Organisation set out the structure and functions of the General Assembly, articles 9-13.

¹⁹⁷ Statutes of the World Tourism Organisation set out the structure and functions of the Executive Council, articles 14-20.

¹⁹⁸ The six regional commissions represent Africa, the Americas, East Asia and the Pacific, Europe, the Middle East, and South Asia.

¹⁹⁹ There are currently specialised committees in respect of: Programmes, Budget and Finance, Statistics and Macroeconomic Analysis, Market Intelligence and Promotion, Sustainable Development, Quality Support, Education Council, Business Council, and Tourism Ethics.

²⁰⁰ See the Organisational Chart on the website <http://www.world-tourism.org/aboutwto/eng/wto_organs/chart.pdf>.

²⁰¹ There are currently 142 member States listed on the webpage <http://www.world-tourism.org/members/eng/members_october2003.pdf>.

external relations),²⁰² and Affiliate Members, which extends to organisations and companies working directly in the tourism industry.²⁰³ The WTO claims to be the only intergovernmental organisation that offers membership to the operational sector of the tourism industry and thus offers a 'unique contact point for discussion between government officials and industry leaders'.²⁰⁴

The WTO operates as an umbrella organisation for world tourism. It has 'a central and decisive role in promoting the development of responsible, sustainable and universally accessible tourism, with the aim of contributing to economic development, international understanding, peace, prosperity and universal respect for, and observance of, human rights and fundamental freedoms'.²⁰⁵ The Organisation's role and functions within the international community can be further illustrated by exploring the various projects it undertakes and its areas of expertise. Whilst there are a number of different projects to which the Organisation turns its attention,²⁰⁶ it is the tourism projects possessing clear environmental mandates that are explored below.

²⁰² There are currently seven Associate Members: Aruba, Flemish Community of Belgium, Hong Kong, Macao, Madeira, Netherlands Antilles, and Puerto Rico. Also, note that the Holy See and Palestine have observer status at the Organisation.

²⁰³ There are more than 350 Affiliate Members, a directory of which is available on the website <http://www.world-tourism.org/frameset/frame_affiliate_directory.html>. Affiliate membership requires endorsement by the government of the state in which the headquarters of the applicant is located.

²⁰⁴ Described on the World Tourism Organisation website <<http://www.world-tourism.org/members/affiliate/menu.html>>.

²⁰⁵ WTO Mission for the New Millennium, see the WTO website <<http://www.world-tourism.org/aboutwto/eng/menu.html>>.

²⁰⁶ Other tourism projects include: Sustainable Tourism-Eliminating Poverty; Tourism Enriches Campaign; World Tourism Day; Tourism Communications; Tourism Legislation Database; Tourism Information and Documentation Resource Centres Database; Liberalisation with a Human Face; Tourism Recovery and Crisis Management; Silk Road; Child Prostitution in Tourism Watch; Safety and Security Issues.

2.4.1 Current Agenda: Sustainable Development of Tourism

The WTO includes as one of its core programme activities the sustainable development of tourism.²⁰⁷ Under this programme, there are a number of activities and initiatives undertaken for the greater goal of 'sustainable tourism development', including the hosting of events, issuing publications and coordinating various sustainable tourism activities. This specialised programme allows the WTO to concentrate its attention on the various issues facing sustainable tourism, whilst incorporating each of the different challenges under one umbrella alliance. The main activities addressing sustainable tourism, in respect of environmental protection, are now discussed in turn.

(a) Global Code of Ethics for Tourism

The Global Code of Ethics was concluded by the WTO as a point of reference for the responsible and sustainable development of world tourism.²⁰⁸ Recognising the projected growth of the international tourism industry over the next two decades, the WTO sought to create a Code to 'minimise the negative impacts of tourism on the environment and on cultural heritage while maximising the benefits for residents of tourism destinations'.²⁰⁹ Following extensive consultation with the Organisation's member states and tourism entities, the Global Code of Ethics was approved

²⁰⁷ See the WTO website <http://www.world-tourism.org/frameset/frame_sustainable.html>.

²⁰⁸ The Code of Ethics are available on the WTO website <http://www.world-tourism.org/code_ethics/eng.html>.

by the General Assemblies of both the World Tourism Organisation and the United Nations.²¹⁰

The Code of Ethics includes ten articles, the first nine of which establish the parameters for responsible and ethical tourism. The Code discusses a variety of issues,²¹¹ of particular note, being that tourism is described as ‘a factor of sustainable development’.²¹² The Code attributes responsibility to all stakeholders involved in tourism development to safeguard the natural environment with a view to equitably satisfying the needs and aspirations of both present and future generations.²¹³ This recognition of the numerous participants within the tourism industry reflects the all-encompassing nature of the WTO, which incorporates the views of a variety of members. The Code of Ethics further asserts that the conservation of ‘rare and precious resources’ such as water and energy is a priority for tourism development, as is the avoidance of waste production.²¹⁴ Moreover, the flow of tourists should be staggered in time and space (such as controlling the distribution of school holidays) in order to reduce pressure on the environment,²¹⁵ and

²⁰⁹ Message from the Secretary-General of the World Tourism Organisation, Francesco Frangialli, available on the WTO website <http://www.world-tourism.org/code_ethics/eng.html>.

²¹⁰ UNGA Resolution A/Res/56/212, *Global Code of Ethics for Tourism*, 28 February 2002; WTO GA Resolution A/Res/406(XIII), *Approval of the Global Code of Ethics for Tourism*, October 1999.

²¹¹ E.g. promoting understanding and respect between peoples and societies; individual and collective fulfilment; cultural heritage; host countries and communities; the obligations of stakeholders; right to tourism; liberty of tourist movements; and tourism workers and entrepreneurs.

²¹² *Global Code of Ethics*, note 210, article 3.

²¹³ *Ibid.*, Article 3(1).

²¹⁴ *Ibid.*, Article 3(2).

²¹⁵ *Ibid.*, Article 3(3).

tourism infrastructure should protect the natural heritage of ecosystems and biodiversity, especially in particularly sensitive areas.²¹⁶

Whilst the Global Code of Ethics introduces valuable conservation methods, perhaps the most important and innovative aspect of the Code is found in Article 10, which calls upon stakeholders to cooperate in the implementation of the principles and monitor their effective application.²¹⁷ The result is the World Committee on Tourism Ethics, which aims to establish an independent and impartial body to assist in the implementation and monitoring of the Code of Ethics.²¹⁸ The composition of the Committee includes members from each of the regional commissions, together with representatives from affiliate members, representing tourism employers, employees, educational institutions, and non-governmental organisations.²¹⁹ Issues of particular concern to the Committee include measures for promoting the application of the Code, and establishing a mechanism to allow the Committee to play a role in the settlement of disputes regarding the interpretation and application of the Code.²²⁰ This is (potentially) a hugely significant development for the regulation of tourism in respect of the natural environment. The Committee represents the only specialised body addressing the sustainable development of tourism which is open and accessible to all stakeholders within the tourism industry. Whilst the decisions of the Committee will have no legal effect within the international

²¹⁶ Such as the desert, polar regions, mountains, coastal areas tropical forests, or wetlands. See *Ibid.*, article 3(4).

²¹⁷ *Ibid.*, article 10(1).

²¹⁸ WTO GA Resolution A/Res/469 (XV) World Committee of Tourism Ethics, October 2003.

²¹⁹ The current members of the Committee are available on the WTO website <http://www.world-tourism.org/code_ethics/eng.html>.

legal system, the Committee is likely to have considerable influence given the Organisation's widely representative and voluntary membership. However, the Committee is still very much in its infancy and the impact it will have on tourism and the international community remains to be seen.²²¹

(b) *Climate Change and Tourism*

In 2003, the WTO undertook a study on the relationship between climate change and tourism resulting in the publication of a background report detailing how climate change impacts upon the tourism industry.²²² This report provided the basis for the first International Conference on Climate Change and Tourism convened by the WTO in cooperation with a number of other relevant international organisations.²²³ Attended by representatives from the scientific community, UN agencies, the tourism industry, NGOs, national tourism offices, and governments, the Conference provided an unprecedented opportunity for international discussion on the consequences, opportunities and risks associated with the impact of climate change on tourism.

²²⁰ WTO *A Milestone for Implementation of the Global Code of Ethics* (3 March 2004). News release available on the WTO website <<http://www.world-tourism.org>>.

²²¹ At the second meeting of the Committee held in October 2004 the World Committee on Tourism Ethics adopted procedures for the conciliation of disputes regarding the application or interpretation of the Code of Ethics. The agreed procedure allows for two or more stakeholders (including governments, companies, local communities, etc.) to submit a matter of dispute to the Committee, following which a report on the matter and provisional recommendations are to be made by the WTO Secretary-General. Furthermore, 'individual stakeholders may also seek the Committee advice on the subject matter of the dispute'. See WTO 'World Committee on Tourism Ethics approves a mechanism for conciliation of disputes' (7 October 2004) at the website <<http://www.world-tourism.org/newsroom/Releases/2004/october/ethics.htm>>.

²²² G.Todd *WTO Background Paper on Climate Change and Tourism* (March 2003). available on the WTO website <<http://www.world-tourism.org/sustainable/climate/pres/graham-todd.pdf>>.

²²³ The Conference took place in Djerba, Tunisia, 9-11 April 2003. The final report of the conference is available on the WTO website <<http://www.world-tourism.org/sustainable/climate/brochure.htm>>. International partner organisations included: UNFCCC; IPCC; WMO; UNEP; UNCCD; and the UN IOC.

The main achievement of the Conference was the conclusion of the Declaration on Tourism and Climate Change.²²⁴ The Declaration emphasises the relationship between tourism and climate change, predominately focusing on the way in which climatic change (and the associated environmental impacts) pose a threat to the tourism industry, although it does also acknowledge that 'some transport used for tourist movements and other components of the tourism industry, contribute in return to climate change'.²²⁵ In addition to basic (and largely generic) environmental commitments such as, promoting research,²²⁶ providing support for developing states,²²⁷ technical assistance²²⁸ and information dissemination,²²⁹ participants agree to urge governments 'to subscribe to all relevant intergovernmental and multilateral agreements, especially the Kyoto Protocol, and other conventions and similar declarations concerning climate change'.²³⁰ The direct endorsement of international legal agreements concerning climate change may be considered an acknowledgement of the Declaration's limitations. Lacking any independent legal effect, the Declaration simply attempts to endorse the rules and standards already established within the international legal system. Finally, it is proposed that the role of the WTO in future years be that of a clearing-house mechanism, whereby information on climate change and tourism is collated, maintained in a database and disseminated by the

²²⁴ The Djerba Declaration is available on the WTO website <<http://www.world-tourism.org/sustainable/climate/decdjerba-eng.pdf>>.

²²⁵ *Ibid.*, preamble.

²²⁶ *Ibid.*, principle 2.

²²⁷ *Ibid.*, principle 3.

²²⁸ *Ibid.*, principle 7.

²²⁹ *Ibid.*, principle 9.

²³⁰ *Ibid.*, principle 1.

Organisation.²³¹ Whilst the WTO's project on climate change still requires much development in order to make a measurable contribution, there has been important progress as a result of the international Conference. Moreover, the adoption of a clearing-house function by the WTO will further endorse its position as the foremost international tourism organisation possessing an environmental agenda.

(c) Ecotourism

The WTO has recognised the significance of ecotourism as an independent and rapidly expanding form of travel.²³² The UN General Assembly proclaimed the year 2002 the International Year of Ecotourism (IYE), giving a mandate to the World Tourism Organisation and UNEP to assume responsibility.²³³ As a result of this, the WTO has undertaken a number of activities promoting the development and regulation of ecotourism at international, national and local levels.²³⁴ The principal event during the IYE was the 2002 World Ecotourism Summit, at which participants from all sectors of the international community were present.²³⁵ The main outcome of the Summit is the Québec Declaration on Ecotourism, the principal purpose of which is to publish a set of 'recommendations for the development of ecotourism activities in the context of sustainable

²³¹ *Ibid.*, principle 9.

²³² See the WTO website devoted to ecotourism at <<http://www.world-tourism.org/sustainable/IYE-Main-Menu.htm>>.

²³³ UNGA Resolution A/Res/53/2000, International Year of Ecotourism 2002, 15 December 1998.

²³⁴ See UNGA Report prepared by the WTO on the Assessment of the Results Achieved in Realising Aims and Objectives of the International Year of Ecotourism, 18 June 2003.

²³⁵ WTO *The World Ecotourism Summit: Final Report* (Madrid: WTO, 2002) (the Québec Declaration) available on the WTO website <<http://www.world-tourism.org/sustainable/IYE/quebec/anglais/Final-Report-QuebecSummit-web.pdf>>.

development'.²³⁶ The Declaration includes general guidelines on promoting the ecotourism concept, together with a series of stakeholder-specific recommendations addressed to governments, the private sector, NGOs, intergovernmental organisations, and indigenous communities. Governments are called upon to support the 'further implementation of the international principles, guidelines and codes of ethics for sustainable tourism ... for the enhancement of international and national legal frameworks, policies and master plans to implement the concept of sustainable development into tourism'.²³⁷ This recommendation recognises the importance of establishing (and continuing to develop) standards and guidelines within the international system in which to regulate ecotourism activities in a global context. The private sector is advised to adopt voluntary regulation (such as ecolabels) and furthermore, to cooperate with governmental and non-governmental organisations to ensure that ecotourism operations in protected areas are practised according to the relevant management plans and regulations.²³⁸ The Declaration recommends that non-governmental and research organisations provide support to other ecotourism stakeholders to ensure that appropriate policies, guidelines and monitoring mechanisms are applied towards sustainability.²³⁹ This channels the research and monitoring capacity of such organisations toward the creation and enforcement of international ecotourism regulation. Intergovernmental organisations and international financial institutions are recognised as having a significant role in the development and regulation of ecotourism in the international community, being charged with

²³⁶ *Ibid.*, preamble.

²³⁷ *Ibid.*, paragraph 15.

²³⁸ *Ibid.*, paragraph 23 and 24.

responsibilities for the implementation of national policy and guidelines, building capacity for the formulation and application of ecotourism policies and plans based on international guidelines, and developing international standards and financial mechanisms for ecotourism certification systems.²⁴⁰ The Declaration acknowledges the vast expertise and diverse experience that international organisations, such as the WTO, bring to international issues, and furthermore, aims to harness this potential for implementing the international regulation and management of ecotourism activities. Finally, the Declaration calls upon local and indigenous communities to implement a strategy for improving the collective benefits for the community of ecotourism development – further employing the views and experience of all relevant stakeholders.²⁴¹

In addition to the WTO's participation in the World Ecotourism Summit, it has also been active in publishing various guidelines for the sustainable development of ecotourism,²⁴² coordinating international and regional conferences for the discussion of ecotourism management,²⁴³ and promoting the implementation of the Declaration's principles into national and local

²³⁹ *Ibid.*, paragraph 34.

²⁴⁰ *Ibid.*, paragraphs 38-40.

²⁴¹ *Ibid.*, paragraph 46.

²⁴² E.g. WTO *Sustainable Development of Ecotourism: A Compilation of Good Practices in SMEs* (Madrid: WTO, 2003); WTO, UNEP and IUCN *Sustainable Tourism in Protected Areas: Guidelines for Planning and Management* (WTO: Madrid, 2003); WTO *Sustainable Development of Ecotourism: A Compilation of Good Practices* (Madrid: WTO, 2001).

²⁴³ E.g. the WTO has supported international, regional and national ecotourism events, such as: International Conference on Ecotourism on Ecotourism in Water Areas (Galicia Spain, 2002); Ecotourism Association of Australia International Conference (Cairns Australia, 2002); Conference on the Sustainable Development of Ecotourism in Desert Areas (Alger Algeria, 2002); Conference on Ecotourism in Mountain Areas: A Challenge to Sustainable Development (Salzburg Austria, 2001); Conference on Sustainable Development and Management of Ecotourism in Small Island Developing States (SIDS) and other Small Islands (Seychelles, 2001).

policy.²⁴⁴ The WTO has continued to be actively involved in the sustainable development of ecotourism after the IYE by participating in a number of follow-up activities, including the creation of a Sustainable Tourism Stewardship Council, to operate as a global accreditation programme for tourism (and ecotourism) activities.²⁴⁵

(d) *International Network for the Sustainable Development of Coastal Destinations*

The WTO and the National Distance University of Spain have collaborated to create the International Network on the Sustainable Development of Coastal Tourism Destinations.²⁴⁶ Still very much in its infancy,²⁴⁷ the Network aims to compile information related to the sustainable development of coastal tourism destinations and disseminate this information via the internet. Moreover, the Network also intends to provide guidelines (setting out sustainability principles) to those bodies developing tourism policies and operations at coastal destinations. Thus, the Network will operate as a web-based mechanism designed to transfer knowledge and the exchange of experiences 'generated by international, public and private sector organisations, especially local authorities and destination management organisations, in the sustainable development and management of coastal tourism'.²⁴⁸ The Network comprises the International Knowledge Resources Guide, the International Guide of Good Practices, and the

²⁴⁴ This Council currently remains in its infancy, with a number of regional seminars being held during 2003 and 2004 in order to determine the future direction and function of such a body: WTO, note 235, p. 7-8.

²⁴⁵ WTO, note 235, p. 19-20.

²⁴⁶ See the website of the Network <<http://www.omt.uned.es/>>.

²⁴⁷ The Network began a testing phase in 2003.

²⁴⁸ WTO *Sustainable Development of Tourism e-bulletin* (Issue 2, February 2003).

Resources and Good Practices Guide, of which only the first is currently functional.²⁴⁹ The Network demonstrates potential for the transfer of practical information among coastal tourism stakeholders, although much of the Network still requires further development in order to be effective.

2.4.2 Looking Forward: The World Tourism Organisation as a Specialised Agency of the UN

The WTO was made an executing agency of the United Nations Development Programme (UNDP) in 1976, before a formal cooperation agreement was signed with the United Nations itself the following year. It is only very recently, however, that the relationship between the WTO and the UN has fully developed, with the World Tourism Organisation being formally appointed a specialised agency of the United Nations in 2004.²⁵⁰

The concept of specialised agencies pre-dates the League of Nations with organisations representing telecommunications, meteorology and postal services being established towards the later part of the nineteenth century.²⁵¹

With a number already in existence,²⁵² '[s]pecialised agencies are

²⁴⁹ The International Knowledge Resources Guide in a database which includes approximately 100 files with links, contact details and a brief description of the relevant organisations, destinations and reports. See the database on the Network's website <http://www.omt.uned.es/resources_guide.htm>.

²⁵⁰ UNGA Resolution A/RES/58/232. Negotiations began in 2001; see the letter dated 21 December 2001 from the Secretary-General of the World Tourism Organisation addressed to the Secretary-General of the United Nations, detailing the Request for Conversion from Intergovernmental Organisation in Consultative Status with the Economic and Social Council to Specialised Agency of the United Nations (E/2002/5), 10 January 2002.

²⁵¹ The League of Nations was created in 1919. For an overview of the historical and political background to specialised agencies, see D. Williams *The Specialised Agencies and the United Nations: The System in Crisis* (London: Hurst, 1987) ch. 1.

²⁵² Specialised agencies of the UN include: Food and Agriculture Organisation; International Civil Aviation Organisation; the World Bank Group; International Finance Corporation; International Development Association; Multilateral Investment Guarantee Agency; International Monetary Fund; UNESCO; World Health Organisation; International

international organisations established by intergovernmental agreement, which serve to realise the aim of the United Nations ... and which are connected with the United Nations by way of an agreement...'.²⁵³ Operating as individual autonomous organisations, specialised agencies represent an authoritative and representative voice on international economic, social, cultural, educational and health issues. By identifying such organisations and establishing a visible co-operative link, the United Nations is seen to recognise its wider international responsibilities and harness the experience and expertise of specific international entities. The relationship between the UN and its specialised agencies is set out in individual agreements between the two organisations, although they usually follow a standard model.²⁵⁴ Generally, specialised agencies are entitled to reciprocal representation at meetings (and reciprocal inclusion of agenda items) and the exchange of information.²⁵⁵ In addition, the UN often has authority to make recommendations for the coordination of policies and activities of specialised agencies,²⁵⁶ and can request annual reports.²⁵⁷ As specialised agencies are structurally autonomous, they possess legal status independent from the UN and its member states.²⁵⁸

Labour Organisation; World Meteorological Organisation; International Maritime Organisation; Universal Postal Union; International Telecommunications Union; World Intellectual Property Organisation; International Fund for Agricultural Development; UN Industrial Development Organisation; International Atomic Energy Agency; World Tourism Organisation. For an overview of the UN's specialised agencies (as at 2001) see Sands and Klein, note 137, ch. 3.

²⁵³ R. Wolfrum (ed.) *United Nations: Law, Policies and Practice*, vol.2 (Dordrecht: Martinus Nijhoff, 1995) 1202.

²⁵⁴ UN Charter, article 57.

²⁵⁵ See e.g. Sands and Klein, note 137, p. 79-83; Conforti, note 147, p. 240-241.

²⁵⁶ UN Charter, article 58.

²⁵⁷ UN Charter, article 64.

²⁵⁸ Furthermore, it is unlikely that the individual agreements between the UN and its specialised agencies constitute international legal agreements with treaty-style obligations. See Conforti, note 147, p. 239-242.

In view of its status as a specialised agency of the UN, the Secretary-General of the WTO joins the Chief Executives Board for Coordination (CEB),²⁵⁹ which is the forum uniting the executive heads of all organisations to further coordination and cooperation on the substantive and management issues facing the UN system.²⁶⁰ The CEB operates in order to provide a 'United Nations voice' and ensure that there is no overlap or duplication of the work of specialised agencies, thereby facilitating increased coordination of the programmes approved by the United Nations system.²⁶¹ The CEB has identified priority themes in its current work programme, one of which is a follow up to the Millennium Summit, including promoting strategies for sustainable development.²⁶² Finally, the phenomenon of globalisation is recognised as a topic requiring attention from the international legal system, to which the CEB offers a unique role in being able to coordinate the work programmes of individual organisations, as it is 'only by working together that the United Nations system could tackle the overall challenge of globalisation and help make it work for the world's people'.²⁶³ By participating in the work of the CEB, the WTO is provided with a voice within the international arena in which to promote tourism issues and advocate the adoption of an approach that will ensure environmentally sustainable tourism on a global level.

²⁵⁹ Formerly the UN Administrative Committee on Coordination (ACC). See the CEB website <<http://ceb.unsystem.org/>>.

²⁶⁰ WTO New Release *WTO Welcomed in the United Nations Chief Executive Board as a New Specialised Agency* (6 April 2004). Available on the WTO website <<http://www.world-tourism.org/newsroom/Releases/2004/april/ceb.htm>>.

²⁶¹ White, note 147, p. 101-107.

²⁶² This also includes follow up work to the World Summit on Sustainable Development, as well as system-wide collaboration in the field of energy and water. See the CEB website <<http://ceb.unsystem.org/work.programme.htm>>.

²⁶³ UN Doc. ACC/2000/4, paragraph 20.

So, what does this transition to specialised agency status mean for the World Tourism Organisation? In its new role, the WTO's work programme is aligned much more closely to that of the UN and therefore the overarching international goals central to the work of the United Nations system are simultaneously addressed by the specialised agencies.²⁶⁴ For example, whilst the WTO does address sustainable development in respect of international tourism, operating as a specialised agency will expand the Organisation's mandate to additional global UN initiatives encompassing the principle of sustainability, such as the 2002 World Summit on Sustainable Development, the work of the Commission on Sustainable Development, and various international treaty obligations. Moreover, the WTO is better placed to introduce the specific problems related to (or generated by) tourism to the more generic work of the UN, thereby increasing international awareness of the relevant issues and contributing to effective responses. The transition of the World Tourism Organisation is a very recent development, so it remains to be seen exactly what will be achieved. However, from the present standpoint there appears to be vastly enhanced opportunity for tourism to be addressed within the international arena and its impact on the global natural environment thereby managed in a more effective and comprehensive manner.

2.5 Conclusion

The very nature of the tourism industry means that any prospective regulation or management regime must adopt an international perspective –

²⁶⁴ For example, the UN Millennium Development Goals.

environmental damage is not restricted to national territories and, moreover, tourism is an inherently global activity. It thus follows that public international law presents itself as the obvious vehicle through which to address these issues. The fundamental problem with utilising this legal system is that traditionally the application of international law has been restricted to states, with the result that other participants, such as individuals, organisations, MNEs and NGOs (which are potentially in most need of regulation in respect of tourism), would not be subject to the international regime. However, the extensive application of public international law to international environmental problems (such as climate change, marine pollution, migratory species etc) and the development of the international legal system to include constitutional functions and adopt more of a 'legal process' approach means that it remains the most suitable vehicle with which to address the global tourism industry. This involves a move from the traditional primarily state-centered perspective, to the recognition of a normative system, which includes many of the relevant participants in the entire legal process. It is this approach that is adopted in this thesis and is most appropriate for addressing the relationship between tourism and the environment.

So, in what way does the international legal system manage or regulate its various participants in respect of tourism activities? States are responsible for implementing international rights and responsibilities into national legal systems, which subsequently impact on the various participants within those systems. Whilst this remains the foremost method for applying international law, it can be problematic due to its indirect effect and to the well-known

difficulties regarding implementation (especially in developing states). Individuals, however, are gaining status in the international legal system, particularly through international human rights law. This is especially evident in respect of participatory rights (such as access to information, participation in planning and decision making, and access to justice) and environmental responsibility (via the polluter-pays principle and civil liability regimes). In this way, individuals involved in the tourism industry – usually individual tourists, small tourism operators, and local communities – are being directly afforded rights and responsibilities by the international legal system.

The tourism industry participant with potential for perhaps the most significant impact on the environment is the multinational enterprise. Although the extensive economic and political influence of many MNEs means regulation is especially important, the international community has not recognised these entities as participants in the international legal system in any meaningful way and, moreover, attempts to manage the activities of MNEs have primarily taken the form of legally non-binding agreements. However, it may be more advantageous to utilise political commitments and public image as a method for extracting action, rather than trying to impose any monetary penalty.²⁶⁵ Many MNE's are not sufficiently dissuaded by direct financial disincentives such as fines or penalties, but may be less inclined to be held accountable for environmental damage where there are

²⁶⁵ Note also that fines for environmental damage are usually of a low economic value (especially compared to the financial capacity of many MNEs), unless damage to property can also be attributed – although even then, it is debatable whether the costs of a financial penalty are effective as a deterrent.

political ramifications or negative press, since the ultimate financial consequences may be considerably more significant.²⁶⁶

NGOs offer the best example of a participant within the tourism industry that plays a vital role throughout much of the international legal process. Whilst not recognised as traditional subjects of international law, NGOs undertake an active role in the international legal process by promoting research, drafting international agreements, monitoring the activities of states, and ensuring compliance and accountability. Thus, NGOs are vital in ensuring the international legal process is representative and accountable to its participants. Operating in a similarly representative manner, international organisations have been recognised to possess some status in the international legal system, but only to the extent allowed by states. In any event, international organisations have played a significant role in developing an international management system for tourism, with the United Nations and the World Tourism Organisation being the leading examples. The UN has addressed tourism primarily via the Commission on Sustainable Development and its independent tourism programme, both of which promote voluntary initiatives and private sector partnerships for ensuring that tourism does not have a negative impact on the natural environment. In this way, international organisations appear to recognise the role played by many private sector MNEs in the tourism industry and

²⁶⁶ By way of example, in 1995 Shell UK announced its intention to sink and dispose of the Brent Spa oil installation in the North Atlantic Sea. However, following intense pressure from Greenpeace and international media scrutiny, Shell UK decided to dismantle the deep sea oil installation on land. Whilst there are also associated financial implications in such situations (such as greater disposal costs in respect of dismantling on land) and ultimately decisions are revenue driven, MNE's appear to be influenced to a greater extent by political and media factors, rather than direct financial penalties.

target the actions of these bodies in an attempt to achieve some level of accountability.

Representing both states and the private sector, the World Tourism Organisation's current agenda contains a number of programmes focusing on the promotion of sustainable tourism. Of particular note, the Global Code of Ethics displays extensive potential for establishing basic tourism principles with a compliance committee currently being developed. The issue of climate change has recently been addressed by the WTO, with provision being made for further research and development into the interrelationship between the tourism industry and climate change. Furthermore, the concept of ecotourism has received substantial international attention following the International Year of Ecotourism and the resulting declaration of the Québec Summit. The work undertaken by the WTO in this respect has afforded the concept of ecotourism greater substance and validity than that demonstrated in earlier definitions,²⁶⁷ with governments, NGOs, the private sector, international organisations and indigenous communities all being accorded specific roles and responsibilities in the future development of ecotourism. In this way, ecotourism becomes a more useful conservation tool (although only in respect of 'ecotourism activities') with increasingly concrete standards and obligations set for various participants in the form of guidelines and recommendations.

²⁶⁷ See discussion of ecotourism in Chapter One (1.4).

Finally, the conversion of the WTO into a specialised agency of the UN has created an opportunity for tourism (and its inalienable relationship with the environment) to be addressed in the context of global issues and afforded greater reconciliatory efforts by the international community. Many of the international developments identified and discussed in this chapter remain in their infancy and, as such, it is difficult to determine their true effectiveness. However, considering the comparatively recent recognition of the environmental issues surrounding the tourism industry and the logistical hurdles of applying a traditional legal structure to a contemporary global problem, the international legal system shows great potential for providing a framework in which the relationship between tourism and the natural environment may be reconciled.

3.

The Application of International Environmental Law to Tourism

The term 'international environmental law' has now been in common currency for more than 20 years.¹ Ever since the rise of environmental concern resulted in the very first legal agreements and tribunal decisions,² commentators have deliberated over the status of international environmental law within the wider context of public international law. Attempts to suggest that international environmental law represents a distinct and self-contained body of law, independent from public international law, have been refuted.³ Instead, international environmental law is deemed to constitute an intrinsic part of public international law, essentially drawing on the relevant principles and structures within the

¹ The general idea of international environmental law can be traced back to the second half of the nineteenth century, although the modern concept is more recent. For a discussion of the history of international environmental law see e.g. P.Sands *Principles of International Environmental Law* (Cambridge: CUP, 2003 2nd edition) ch. 2.

² Generally identified by a first wave of developments at the turn of the century, such as the 1893 Bering Fur Seals Fisheries Arbitration (1 Moore's International Arbitration Awards 755); the 1900 Convention destinée à assurer la conservation des diverses espèces vivant à l'état sauvage en Afrique qui sont utiles à l'homme ou inoffensives (B.Ruster and B.Simma *International Protection of the Environment: Treaties and Related Documents* vol.4 at p.214); the 1900 Convention between the Riverine States of the Rhine Respecting Regulations Governing the Transport of Corrosive and Poisonous Substances (B.Ruster and B.Simma *International Protection of the Environment: Treaties and Related Documents* vol.25 at p.214); and the 1902 Convention for the Protection of Birds Useful to Agriculture (B.Ruster and B.Simma *International Protection of the Environment: Treaties and Related Documents* vol.4 at p. 1615); followed by another major effort during the 1930s and 1940s, including the 1938 Trail Smelter Arbitration (33 *AJIL* 182 and 35 *AJIL* 684); the 1933 Convention Relative to the Preservation of Fauna and Flora in their Natural State (172 League of Nations Treaty Series 241); the 1940 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (161 UNTS 193); and the 1946 International Convention for the Regulation of Whaling (338 UNTS 336).

³ P.Birnie and A.Boyle *International Law and the Environment* (Oxford: OUP, 2002 2nd edition) ch. 1; Sands, note 1, ch. 1; M.Fitzmaurice 'International Environmental Law as a Special Field' 25 *Netherlands Yearbook of International Law* (1994) 181.

international legal system and applying these principally to environmental considerations. The strict categorisation of international law 'branches' creates problems which are largely superficial (for example, is the UN Law of the Sea Convention part of public international law, international environmental law, or the law of the sea?⁴). Accordingly, the term 'international environmental law' represents a body of law founded within the public international legal system, which demonstrates a focus on (and in some cases prioritisation of)⁵ environmental issues.

So what, then, does international environmental law encompass? The scope of this topic conceivably extends to the international legal regulation of any aspect of the 'environment', which in general terms includes 'the conditions under which any person or thing lives or is developed' or 'the sum-total of influences which modify and determine the development of life or character'.⁶ This definition has received little further explanation by subsequent environmental declarations,⁷ resulting in a wide body of topics being grouped within international environmental law, including the control of waste, hazardous substances and nuclear energy, protection of the atmosphere and outer space, and conservation of the marine environment and biological diversity.⁸ It thus follows that there is a vast range of topics which could be considered to fall within the ambit of international

⁴ The same observation could be made for e.g. international human rights law, air and space law, and the law of the sea.

⁵ The prioritisation of interests can sometimes be unclear, especially in respect of the sustainable development concept where environmental and developmental interests compete for priority.

⁶ Oxford English Dictionary (Oxford: Clarendon Press, 1989 2nd edition).

⁷ Neither the 1972 Stockholm Declaration on the Human Environment, nor the 1992 Rio Declaration on Environment and Development, offer a particularly enlightening description of what the 'environment' constitutes.

environmental law, since so many legal instruments are capable of having an impact on the natural environment.

It is the intention of this chapter to evaluate the extent to which the various aspects of international environmental law are applicable to tourism. It has been established in the preceding chapter that the tourism industry is an inherently global phenomenon and the subject of much international attention. The challenge now is to identify which particular aspects of international environmental law can be seen to address tourism activities specifically, and to analyse the resulting impact of such regulation and management. This will enable a conclusion to be reached as to the relative (or in some cases, potential) effectiveness of using international environmental law as a mechanism for regulating tourism. For the purpose of facilitating this discussion, the rules of international environmental law are divided into the two broad thematic areas often identified by commentators in this subject – namely, the regulation of environmental pollution and the conservation of biological diversity.⁹ Each area will be examined in turn, including an analysis of the main regimes which may be applicable to tourism, beginning first with regulation of environmental pollution.

⁸ Note that in some circumstances, the environment is defined to include cultural, social, or industrial interests. However, the focus of the present discussion, is the natural environment.

⁹ Whilst some aspects of international environmental law might fall within both of these areas, this division is used purely to aid explanation of the subject matter in relation to tourism. Where there is potential for material to cross-over, this is dealt with specifically in respect of that topic.

3.1 Environmental Pollution

In its most general sense, pollution is considered to be the contamination of the environment with anthropogenic substances possessing harmful or objectionable effects.¹⁰ Such contamination occurs in respect not only of the atmosphere and the marine environment, but also regarding landmass, although the notion of state sovereignty allows for the exploitation (and pollution) of national resources.¹¹ Environmental pollution has featured as a prominent concern for the international community for a number of years, although the preventative techniques adopted by international environmental agreements have varied over this time.¹²

Adopting a broad interpretation, the issue of environmental pollution is addressed by the international customary law principle of 'good neighbourliness' between states, which incorporates (i) a duty to prevent, reduce and control pollution and environmental harm, and (ii) a duty to cooperate in cases of environmental risk, through notification and consultation procedures.¹³ The first obligation – that of environmental harm prevention – can be traced back to the *Trail Smelter* arbitration¹⁴ which concluded that 'no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of

¹⁰ Oxford English Dictionary (Oxford: Clarendon Press, 1989 2nd edition).

¹¹ Principle 21 of the Stockholm Declaration enforces states' right to exploit their own resources to the extent that damage is not caused to the environment of other states or areas beyond national jurisdiction. Thus, claims for environmental pollution are mostly likely to occur in respect of transboundary damage.

¹² For an overview of the approach adopted by international environmental law to pollution prevention, see e.g. Birnie and Boyle, note 3, p. 124-125; A. Springer *The International Law of Pollution: Protecting the Global Environment in a World of Sovereign States* (Westport, Conn.: Quorum Books, 1983).

¹³ For a general introduction to 'good neighbourliness' see e.g. Birnie and Boyle, note 3, p. 109-137; Sands, note 1, p. 249-251.

¹⁴ (*United States v Canada*) 33 AJIL (1939) 182 and 35 AJIL (1941) 684.

another'.¹⁵ Since this dispute, the scope of the principle has been extended from harm caused by emissions (in this case fumes from an industrial smelter), to any form of environmental harm that may transcend national boundaries.¹⁶ The principle has been employed in international environmental law over a number of decades, reaffirming its status as a principle of international custom.¹⁷ The second duty attached to good neighbourliness is that of transboundary cooperation, most often evidenced in the form of notification and consultation between states. The *Lac Lanoux* arbitration established the duty of prior notification and consultation (or negotiation) between states in respect of shared natural resources.¹⁸ This obligation has been further expounded in subsequent international developments¹⁹ and confirmed by the ICJ where shared natural resources were the subject of dispute.²⁰

The good neighbourliness obligation can be seen to be applicable to tourism resources in a general management context,²¹ as well as in situations where

¹⁵ 35 *AJIL* (1941) 684 at 716.

¹⁶ See the *Advisory Opinion on the Legality or Threat of Use of Nuclear Weapons* ICJ Reports (1996) 226 at paragraph 26 where the ICJ comments that '[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment'.

¹⁷ E.g. 1972 Stockholm Declaration on the Human Environment, principle 21; 1979 Long-range Transboundary Air Pollution Convention, preamble; 1992 Rio Declaration on Environment and Development, principle 2; 1992 Convention on Climate Change, preamble; 1992 Convention on Biological Diversity, article 3; 2001 Draft ILC Articles on Prevention on Transboundary Harm from Hazardous Activities.

¹⁸ 24 *ILR* (1957) 101. In this case regarding the diversion of a watercourse shared by France and Spain.

¹⁹ E.g. 1972 Stockholm Declaration, principle 24; 1978 UNEP Principles on Conservation and Harmonious Utilisation of Natural Resources Shared by Two or More States; 1991 Convention on Environmental Impact Assessment in a Transboundary Context, principle 19; 1992 Rio Declaration; 2001 ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities.

²⁰ *Case Concerning the Gabčíkovo-Nagymaros Dam (Hungary v Slovakia)* ICJ Reports (1997) 7.

²¹ E.g. this may be evident in places like the Pyrenees Mountains where France, Andorra and Spain share state borders and the extensive development of alpine tourism facilities in either country may create a transboundary environmental risk. Similarly, Lake Titicaca lies

transboundary resources are actively promoted as tourism attractions and are consequently managed under the cooperation of the relevant states to avoid environmental pollution. For example, Victoria Falls on the Zambezi River straddles the borders of both Zambia and Zimbabwe, providing tourists with the opportunity to visit this natural resource from either country. Both states actively promote Victoria Falls as a tourism resource and offer much in the way of visitor services, activities and facilities. Similarly, the transboundary nature of the Falls requires the cooperation of Zambia and Zimbabwe to guarantee that development projects and tourist activities are undertaken in accordance with the customary principle of good neighbourliness and ensure pollution of the resource is prevented.²²

Whilst this customary law principle offers a basic rule and starting point for discussion on the regulation of environmental pollution, there are more specific obligations established in international environmental agreements which have a direct impact on the tourism industry.²³ Marine pollution is explored in the first instance as one aspect of international environmental law that has a direct impact on tourism – specifically because of the extensive development of tourism activities based on the marine

high in the Andes Mountains astride the Peruvian and Bolivian borders, meaning that tourism-orientated development from either state would require adherence to the customary law principle of good neighbourliness to prevent the risk of transboundary environmental harm. Furthermore, coastal tourism development – such as much of that by Mediterranean states – must also be undertaken in accordance with this principle of customary law as the risk of transboundary environmental harm extends not only to other states, but more generally to areas beyond national jurisdiction, thereby also potentially encompassing non-territorial seas.

²² Tourism has had a significant derogatory effect on the natural environment of Victoria Falls with an estimated more than 500,000 tourists visiting the area annually. See Environment News Service 'Victoria Falls Marred by Pollution' (September 2000) <<http://forests.org/archive/africa/vicfallm.htm>>. Note also that Victoria Falls (Mosi-Oa-Tunya National Park) was inscribed on the World Heritage List in 1989 and cooperation between Zambia and Zimbabwe has been facilitated by *inter alia* the Transboundary Protected Areas initiative sponsored by IUCN, UNESCO and the World Heritage Centre.

environment and also because of the wide-ranging legal regime established in respect of marine pollution. Thus, it is considered both a logical and pertinent place from which to begin an examination of international law's impact on the tourism industry.

International environmental law addresses many of the sources of marine pollution, often using traditional 'hard law' instruments to establish framework agreement on an issue, then employing 'soft law' initiatives to provide further substance and detailed guidance on implementation. Tourism activities increase the potential for environmental damage from marine pollution in many ways, the most significant being from land-based and shipping activities. Thus, discussion will focus on those two sources of marine pollution and, furthermore, analyse how marine pollution is controlled in respect of the unique situation of the Antarctic tourism industry.

3.1.1 Marine Pollution

Tourism activities pose a real and significant threat to the global marine environment. A number of sources from which marine pollution can occur have been documented – all of which may be associated to varying degrees with the tourism industry.²⁴ However, of most relevance to the tourism industry is pollution from land-based sources and vessel-sourced pollution.²⁵

²³ Tourism is responsible for contributing to both global marine and atmospheric pollution. Each will be looked at in turn, beginning with marine pollution.

²⁴ For an account of the main sources of marine pollution see e.g. R.Churchill and A.V.Lowe *The Law of the Sea* (Manchester: MUP, 1999) ch. 15; Report of the UN Secretary General to the UNGA (Doc. A/44/461) *Law of the Sea: Protection and Preservation of the Marine Environment* (18 September 1989). For a description of marine

The Law of the Sea Convention (UNCLOS) focuses on a multitude of issues relating to the use of the ocean and the management of the sea's resources,²⁶ with many of its provisions regarding maritime navigation and territorial sea limits being equally applicable to tourism activities.²⁷ The Convention does establish rights and obligations in respect of environmental marine protection;²⁸ however, the legal nature of this section is largely qualified, with no substantive obligations imposed, or quantifiable rights conferred, on state parties.²⁹ Instead, UNCLOS incorporates what are now regarded as the generally accepted international rules and standards in respect of marine pollution – whilst the provisions of more specialised agreements (such as MARPOL, OSPAR and the Regional Seas Conventions) impose more detailed obligations.³⁰ Thus, whilst UNCLOS outlines the common standards in respect of the marine environment, the impact of tourism has

pollution as a result of tourism activities see e.g. UNEP *A Sea of Troubles* (UNEP, 2001) 22-24.

²⁵ It has been estimated that marine pollution can be attributed as 12% from shipping, 10% from dumping, 1% from sea-bed activities, 44% from land-based sources, and 33% from the atmosphere (much of which originates from land-based activities): GESAMP *The State of the Marine Environment* UNEP Regional Seas Reports and Studies No. 115, Nairobi (1990) 88.

²⁶ The Convention includes provisions regarding, *inter alia*, navigational rights, territorial sea limits, economic jurisdiction, legal status of resources on the seabed beyond the limits of national jurisdiction, passage of ships through narrow straits, conservation and management of living marine resources, protection of the marine environment. For a general discussion on the operation of the Law of the Sea Convention see e.g.: M.Nordquist et al *United Nations Convention on the Law of the Sea 1982: A Commentary (vols. I-VI)* (The Hague: Martinus Nijhoff, 1985-2002); H.Scheiber (ed.) *Law of the Sea: the Common Heritage and Emerging Challenges* (The Hague: Martinus Nijhoff, 2000); Churchill and Lowe, note 24; Brown *The International Law of the Sea (vol. 1)* (Aldershot: Dartmouth, 1994); D.O'Connell *The International Law of the Sea (vols. I & II)* (Oxford: Clarendon Press, 1982-1984). For an overview of the Convention regarding environmental protection see e.g.: Birnie and Boyle, note 3, ch. 7; Sands, note 1, ch. 9; Brubaker *Marine Pollution and International Law: Principles and Practice* (London: Belhaven Press, 1993).

²⁷ E.g. UNCLOS provisions regarding innocent passage (Articles 19 and 21); rights, jurisdiction and duties of the coastal State in the exclusive economic zone (Article 56); and duties of the flag state (Article 94).

²⁸ Generally found in Part XII of the Convention.

²⁹ Section I: General Provisions (Articles 192 to 196) of Part XII, 1982 Convention on the Law of the Sea (21 ILM 1261). For a discussion on the negotiation of Part XII of the Convention see Nordquist et al, note 26, p. 35.

been recognised and addressed by more specialised agreements, imposing management regimes, development strategies, and pollution requirements on state parties.

Where tourism activities result in land-based marine pollution, maritime jurisdictional rules provide that the state responsible must take all measures to ensure that activities under their jurisdiction or control are conducted so as not to cause damage to other states, or do not spread beyond the areas where they exercise sovereign rights.³¹ However, as states enjoy the exercise of unique rights throughout the exclusive economic zone (extending up to 200 nautical miles from the baseline),³² the potential for pollution of the marine environment to occur, before reaching the high seas, is considerable.³³ The jurisdictional limits regarding navigation and vessel-sourced pollution are somewhat more complex. Ships must have a 'genuine link' with the flag state with which they register, although the interpretation of this requirement remains vague, allowing some cruise ships to register in foreign states which possess less strenuous pollution regulations, or none at all.³⁴ This creates cause for concern, because it is the flag state that retains

³⁰ See e.g. Boyle 'Marine Pollution Under the Law of the Sea Convention' 79 *AJIL* (1985) 347.

³¹ UNCLOS, article 194(2).

³² UNCLOS, article 56 and 57. For a discussion on the jurisdictional scope of the law of the sea see e.g. M.Shaw *International Law* (Cambridge: CUP, 2003 5th edition) ch. 11; M.Evans 'Law of the Sea' in M.Evans (ed.) *International Law* (Oxford: OUP, 2003); I.Brownlie *Principles of Public International Law* (Oxford: OUP, 1998 5th ed) chs. 9 – 11. Regarding jurisdiction for marine protection, see e.g. Churchill and Lowe, note 24, ch. 15; Boyle, note 30, p. 347.

³³ Part VII of UNCLOS sets out the relevant provisions for the High Seas. However, note that the sovereign rights of states may not extend such distances where the territorial sea between states with opposite or adjacent coastlines are of a shorter distance (Article 15, UNCLOS). This is especially relevant in closed-sea environments, such as the Mediterranean. Also, special jurisdictional provisions apply for archipelagic states (Part IV, UNCLOS).

³⁴ UNCLOS, article 91. See the 1986 Convention on Conditions for Registration of Ships which aims to ensure (or strengthen) the genuine link between a State and ships flying its flag (Article 1), although note that this Convention has not entered into force.

ultimate responsibility for the regulation of its ships in whatever jurisdictional context they operate.³⁵ However, port states can establish 'particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters', thereby ensuring that vessels are also regulated whilst in territorial waters.³⁶ Moreover, port states now have the jurisdiction to take enforcement action against a cruise ship in its port where it suspects the vessel to have discharged pollutants *outside* the port state's internal waters, territorial sea or exclusive economic zone, 'in violation of applicable international rules and standards'.³⁷

(a) Land-based Marine Pollution

One form of pollution regulation with significant relevance to the tourism industry is marine pollution from land-based sources (which also includes atmospheric pollution originating from land activities). Identified as the largest source of marine pollution,³⁸ this includes pollutants discharged as sewage and industrial waste, run-off from agricultural chemicals and fertilisers, water from (nuclear) power stations, vehicle exhaust discharged into the atmosphere, and fumes from domestic and industrial chimneys. The tourism industry's contribution to land-based marine pollution is significant and takes place in a number of ways. One result of developing tourism infrastructure such as hotel complexes, commercial developments and water sport activities is an increase in waste production levels. Waste from the

³⁵ UNCLOS, article 92.

³⁶ UNCLOS, article 211(3). Similarly, coastal states may adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels (including vessels exercising the right of innocent passage): Article 211(4).

tourism industry may take the form of inadequately treated wastewater, fertilisers and pesticides used extensively on golf courses, gardens and recreational grounds, oil spills from marine leisure craft, air pollution from the burning of fossil fuels (especially prominent in many forms of tourism transportation), and litter.³⁹

The regulation of land-based marine pollution⁴⁰ has achieved little by way of international agreement primarily due to the fact that this type of pollution is greatly affected by perceptions of national sovereignty, with pollutants being sourced from within national boundaries. The Law of the Sea Convention imposes a general obligation on states to 'prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures', but provides no detail on how this should be achieved.⁴¹ The issue receives more comprehensive coverage however, in the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention).⁴² Parties to this Convention are required to 'prevent and eliminate pollution from land-based sources', using the best available techniques for point sources, and the best environmental practice for point

³⁷ UNCLOS, article 218.

³⁸ GESAMP, note 25, p. 88.

³⁹ OSPAR Commission *OSPAR Background Document on Tourism* (2003) No.184, 10-12.

⁴⁰ For an overview see e.g. T.Mensah 'The International Legal Regime for the Protection and Preservation of the Marine Environment from Land-based Sources of Pollution' in A.Boyle & D.Freestone (eds.) *International Law and Sustainable Development* (Oxford: OUP, 1999); Churchill and Lowe, note 24, ch.15; Sands, note 1, p. 427-438.

⁴¹ UNCLOS, article 207. The Convention only adds that states should endeavour to establish global and regional rules and standards in order to achieve this objective: article 207(4). Article 213 adds that states should adopt laws to ensure enforcement in respect of land-based marine pollution.

⁴² The 1992 OSPAR Convention (32 ILM 1068) incorporates and replaces the 1974 Paris Convention on the Prevention of Marine Pollution from Land-Based Sources (13 ILM 352) and the 1972 Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (932 UNTS 3).

and diffuse sources.⁴³ Accordingly, state parties to the Convention⁴⁴ are under an international obligation to address pollution from land-based sources, which as noted above, would include pollution occurring as a result of tourism.

In 2003 the OSPAR Commission⁴⁵ issued a 'Background Document on Tourism' which examines the impact of tourism on the marine environment, its species, habitats, and biological diversity.⁴⁶ The study recognises tourism as one of the world's fastest growing industries, whilst acknowledging the great variety and fragility of the coastal environment. A number of the negative environmental impacts of tourism in coastal zones are highlighted,⁴⁷ before the Background Document suggests measures for managing environmental impacts, identifies existing actions related to sustainable tourism in coastal zones, and recommends that an integrated coastal zone management strategy (ICZM) is implemented in relation to tourism. Considered a 'tool for the achievement of sustainable development in coastal zones', ICZM embodies a set of general principles many of which are already in common use within international environmental law.⁴⁸ In light of this, the OSPAR Commission makes a number of recommendations.

⁴³ OSPAR, article 3; and annex 1, article 1. Note the term 'land-based sources' is defined for use in the Convention in article 1(e).

⁴⁴ There are 16 contracting parties to the Convention, including the European Union, along with 17 governmental organisations which have observer status. See the website <<http://www.ospar.org/>>.

⁴⁵ The Commission is the governing body of the OSPAR Convention comprised of the contracting parties. For further information see the OSPAR website <<http://www.ospar.org/>>.

⁴⁶ OSPAR Commission, note 39.

⁴⁷ Note the Report does also identify some positive impacts of tourism including, revenue creation for the maintenance of natural areas, environmental awareness raising, and alternative employment: OSPAR Commission, note 39, p. 12.

⁴⁸ ICZM incorporates *inter alia* the precautionary principle, monitoring, localised solutions, participation, cooperation, and the adoption of a combination of instruments: OSPAR Commission, note 39, p. 13-17.

Of particular importance is the control of coastal tourism development (including the implementation of planning and development strategies), the monitoring and combating of pollution, raising environmental awareness (via campaigns, training programmes and documentation), and the use of economic instruments and incentives to promote sustainable tourism.⁴⁹ The OSPAR Background Document on Tourism provides an example of a situation where an international treaty has established initial standards for state parties to consent to, and then further developed more specific and substantive guidance on relevant issues through the Convention's structural framework. Although the Background Document is not legally binding on parties, it provides valuable guidance, management plans, and conservation strategies for addressing the problem of tourism-generated land-based marine pollution activities in the North-East Atlantic.

Land-based sources of marine pollution are also regulated in certain areas by the UNEP Regional Seas programme.⁵⁰ With more than 140 participating coastal states, the Regional Seas Programme creates mechanisms for cooperation between governments for the achievement of shared environmental goals. Whilst all of the 14 regional programmes coordinated by UNEP display a similar approach, each is tailored to address the specific environmental problems of that region. Of particular interest to the present discussion are the protocols in force⁵¹ which specifically

⁴⁹ OSPAR Commission, note 39, ch. 5.

⁵⁰ See the website <<http://www.unep.ch/seas/>>. For an overview of the UNEP Regional Seas initiative see e.g. P.Akiwumi and T.Melvasalo 'UNEP's Regional Seas Programme: Approach, Experience and Future Plans' 22(3) *Marine Policy* (1998) 229.

⁵¹ Note there is also a protocol on the prevention, reduction and control of land-based sources and activities for the wider Caribbean, which was adopted 1999 but has not yet entered into force. See the Caribbean Environment Programme website <http://www.cep.unep.org/law/sub_law.htm>.

regulate land-based pollution in the Mediterranean,⁵² the Kuwait region,⁵³ the South-East Pacific,⁵⁴ and the Black Sea.⁵⁵ These protocols operate in much the same way by prohibiting the release of certain substances which are toxic, persistent and liable to bioaccumulate,⁵⁶ whilst providing that less harmful substances receive authorisation before being discharged into the marine environment.⁵⁷ The Athens Protocol for the Mediterranean region specifically identifies tourism as a sector of activity that must be taken into consideration when developing future plans and programmes and furthermore, requires monitoring and assessment to be undertaken in respect of land-based pollution from this sector.⁵⁸ The Regional Seas Programme demonstrates the value of an environmental problem being addressed at an international level, then being implemented on a regional basis in order to take into consideration local environmental conditions and political preferences.

Finally, the threat to the marine environment from land-based activities has been addressed by the international community by way of the Global

⁵² The 1980 Athens Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities (as amended) (19 ILM 869), to the 1976 Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (15 ILM 290).

⁵³ The 1990 Protocol for the Protection of the Marine Environment against Pollution from Land-Based Sources, to the 1978 Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (1140 UNTS 133).

⁵⁴ The 1983 Quito Protocol for the Protection of the South-East Pacific against Pollution from Land-based Sources, to the 1981 Lima Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific (*International Environmental Legal Materials and Treaties* 981:85).

⁵⁵ The 1992 Protocol on Protection of the Black Sea Marine Environment Against Pollution from Land-based Sources, to the 1992 Bucharest Convention on the Protection of the Black Sea Against Pollution (32 ILM 1101).

⁵⁶ 1980 Athens Protocol, article 5 and annex I; 1992 Black Sea Protocol, article 4 and annex I; Quito Protocol, article 4 and annex I. The Kuwait Protocol requires state parties to implement action programmes and adhere to a permit system in respect of land-based marine pollution (Articles 4 to 6 and Annexes I and III).

⁵⁷ Athens Protocol, article 6 and annex II; Black Sea Protocol, article 4 and annex II; Quito Protocol, article 5 and annex II.

Programme of Action for the Protection of the Marine Environment from Land-based Activities (GPA).⁵⁹ Adopted in 1995 by 108 governments and the European Commission, the GPA provides guidance aimed at national and regional authorities for devising and implementing procedures aimed at the prevention, reduction, control and elimination of marine degradation from land-based activities. In its most practical sense, the GPA facilitates states in protecting and preserving the marine environment, by recommending management and regulation techniques which address the problems associated with marine pollution from land-based sources.⁶⁰

Land-based pollution occurring from the discharge of sewage and garbage into the marine environment exists as a serious threat to, amongst many other things, local coral reefs and their biodiversity. The discharge of sewage, waste materials, garbage, and silting from construction work has resulted in significant reef degradation in Kaneohe Bay, on the island of Oahu, Hawaii. A 'large, shallow embayment with restricted water circulation that was once known for its flourishing coral reefs', Kaneohe Bay suffered 'total destruction of the coral reef communities in two-thirds of the bay' as a direct result of urbanisation and tourism development.⁶¹ In

⁵⁸ 1980 Athens Protocol, article 8 and annex I.

⁵⁹ See the website of the GPA, which acts as a clearing-house mechanism at <<http://www.gpa.unep.org/>>.

⁶⁰ The GPA makes recommendations on issues such as identifying and assessing problems related to marine pollution; establishing priorities for action; setting management objectives for priority problems; identifying, evaluating and selecting strategies and measures to achieve objectives; and developing criteria for evaluating the effectiveness of different strategies. For further detail, see the full text of the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities, and the 1995 Washington Declaration on the Protection of the Marine Environment from Land-based Activities, available on the GPA website <<http://www.gpa.unep.org/documents/about-GPA-docs.htm>>.

⁶¹ J. Nybakken *Marine Biology: An Ecological Approach* (San Francisco: Benjamin Cummings, 2001 5th ed.) 478-481; Austin et al. *The Exploitation of Coral Reefs* (Shrewsbury: Field Studies Council, 1996) 19-23.

situations such as these, the effective regulation of tourism development and management of subsequent recreational activities makes a significant contribution to the avoidance of environmental degradation.

(b) Vessel-sourced Marine Pollution

A second type of marine pollution which is aggravated by the tourism industry is that originating from shipping. The operation of cruise ships alone generates an enormous volume of waste, with an estimated 10 million passengers holidaying per year – more than 80 per cent of which are from the United States.⁶² A typical cruise ship carrying 3,000 passengers and crew⁶³ can generate up to 135,000 litres of human waste (sewage) and over 1,000,000 litres of grey water⁶⁴ every day. Combined with approximately 7,000 kilograms of garbage and solid waste, 67,000 litres of toxic chemicals, and more than 31,000 litres of oily bilge water each day, a cruise ship has the potential to generate copious quantities of polluting waste.⁶⁵

⁶² R.Klein *Cruise Ship Blues: The Underside of the Cruise Industry* (Canada: New Society Publishers, 2003). For further statistics on the operation of cruise ships see e.g.: World Tourism Organisation *Worldwide Cruise Ship Activity* (Madrid: WTO, 2003); J.Kester 'Cruise Tourism' 9(3) *Tourism Economics* (2003) 337. For a discussion on cruise ships and marine pollution see e.g.: A.Schulkin 'Safe Harbors: Crafting an International Solution to Cruise Ship Pollution' 15 *Georgetown International Environmental Law Review* (2002) 105; L.Nowlan and I.Kwan 'Cruise Control – Regulating Cruise Ship Pollution on the Pacific Coast of Canada' *West Coast Environmental Law* (2001) available at <<http://www.wcel.org/issues/water>>; the website of Oceana <<http://www.oceana.org>>, a non-profit international advocacy organisation dedicated to protecting and restoring the world's oceans.

⁶³ Cruise ships typically carry approximately 3,000 passengers and crew throughout a voyage. The newest (and largest) cruise ship in operation is Cunard's *Queen Mary II* which has the capacity to carry more than 3,800 people. For further information see the Cunard website <<http://www.cunardline.com>>.

⁶⁴ Grey water includes non-sewage waste water from sources such as sinks, showers, laundries, and dishwashers.

⁶⁵ See e.g.: Klein, note 62; Schulkin, note 62; Nowlan and Kwan, note 62. Note that estimates vary depending on the source and method of data collection. The figures provided here represent an overall average indication of the data available.

Whilst there are a number of international treaties which address the issue of marine pollution from shipping,⁶⁶ the most relevant to the tourism industry is the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL).⁶⁷ The text of the MARPOL Convention contains the main body of the agreement which is then supplemented by six technical annexes detailing the regulations for the prevention of various types of marine pollution. MARPOL imposes a general obligation on state parties to prevent the pollution of the marine environment from the discharge of harmful substances or effluents containing specific substances.⁶⁸ States must accept the annexes regulating the prevention of pollution by oil⁶⁹ and the control of pollution by noxious liquid substances in bulk,⁷⁰ whilst the adherence to the remaining annexes is voluntary. Of particular interest to the tourism industry are the annexes on the prevention of sewage, garbage and air pollution.⁷¹ Sewage⁷² is regulated by requiring surveys to ensure that ships are equipped with an acceptable sewage management system (such as a sewage treatment plant, a waste disinfectant system, or a sewage holding tank) for which an international sewage pollution certificate is

⁶⁶ E.g. 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation (30 ILM 733); 1989 Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (28 ILM 657); 1972 Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (932 UNTS 3); 1974 Safety of Life at Sea Convention (1184 UNTS 2); 1972 Convention on the International Regulations for Preventing Collisions at Sea (United Kingdom Treaty Series 77); 1969 International Convention on Civil Liability for Oil Pollution Damage (973 UNTS 3).

⁶⁷ The Convention was amended in 1978 and entered into force in 1983.

⁶⁸ MARPOL Convention, article 1.

⁶⁹ MARPOL Convention, annex I. This Annex relates to pollution from oil tankers, notably introducing the double-hull requirement for new tankers.

⁷⁰ MARPOL Convention, annex II. Annex II details the discharge criteria and measures for the control of pollution by noxious liquid substances carried in bulk.

⁷¹ Annexes IV, V and VI respectively. Note that Annex III regulates the prevention of pollution by harmful substances in packaged form, but is not directly relevant to the present discussion on tourism.

⁷² 'Sewage' includes waste from toilets, drainage from medical premises, drainage from spaces containing living animals, and waste waters when mixed with the drainages above: MARPOL Convention, regulation 1(3).

issued.⁷³ The discharge of sewage is permitted at various distances from the nearest land depending on the extent to which the waste has been treated.⁷⁴ The provisions regulating the discharge of sewage have however, been recently revised, with amendments to Annex IV requiring ships to be equipped with a sewage treatment plant, a sewage comminuting and disinfecting system, or a sewage holding tank.⁷⁵ Upon the entry into force of the amendments,⁷⁶ the discharge of sewage will be prohibited except where the correct treatment has taken place and the discharge is made at the requisite distance from land. These new rules must be introduced immediately on all new ships, whilst existing ships must comply within five years.⁷⁷

The disposal of garbage⁷⁸ at sea is regulated by reference to the type of garbage and the distance of the ship from the nearest land. For example, disposal must be at least 25 nautical miles for dunnage, lining and packing material which will float, but only 12 nautical miles for food wastes and all other garbage (including paper products, rags, glass, metal, bottles, crockery and similar refuse).⁷⁹ The disposal of garbage in special areas (including the Mediterranean Sea, the Baltic Sea, the Black Sea, the Red Sea and the Gulfs area) is largely prohibited.⁸⁰ Finally, upon entry into force of the sixth annex, air pollution from ships will be regulated by setting limits on sulphur

⁷³ MARPOL Convention, regulations 3 to 7, annex IV.

⁷⁴ MARPOL Convention, regulation 8, annex IV.

⁷⁵ 51st Session of the Marine Environment Protection Committee, 29 March – 2 April 2004.

⁷⁶ Anticipated entry into force is 1 August 2005.

⁷⁷ See the website of the IMO <<http://www.imo.org>>.

⁷⁸ 'Garbage' includes all kinds of victual, domestic and operational waste (excluding fresh fish) generated during the normal operation of the ship and liable to be disposed of continuously or periodically: MARPOL Convention, regulation 1(1), annex V.

⁷⁹ MARPOL Convention, regulation 3(1), annex V. Note that where certain waste has passed through a comminute or grinder it may be disposed of closer to land: Regulation 3(1)(c).

oxide and nitrogen oxide emissions from ship exhausts and prohibiting deliberate emissions of ozone depleting substances.⁸¹ The provisions of the MARPOL Convention must be applied by states not only to their own ships, but also to violations within their jurisdiction.

There are numerous examples of cruise ships receiving fines for causing environmental damage, most often as a result of illegal discharges into the ocean.⁸² Recently, the Norwegian Cruise Line company pleaded guilty to circumventing the oily water separator, thereby allowing oily bilge to be discharged directly into the sea on numerous occasions from 1997 to 2000. The company was fined \$US 1.5 million, whilst the individuals responsible for falsifying log books to conceal the dumping of waste oil are being prosecuted in the United States, each facing imprisonment terms of up to 15 years if convicted.⁸³

(i) Marine Pollution in Antarctica

Antarctica is another natural environment (being especially vulnerable owing to its sensitive ecosystem) to have received increased attention in recent years on account of a proliferation in tourist numbers. The majority of the estimated 13,500 tourists to visit Antarctica during the 2002-03 season did so by cruise ship, with a typical itinerary including visits to penguin colonies, scientific stations, and historic sites, along with

⁸⁰ MARPOL Convention, regulation 5, annex V.

⁸¹ MARPOL Convention, annex VI.

⁸² See for example the summary of environmental fines in relation to cruise ships on the website <<http://www.cruisejunkie.com/>>, a US academic campaigning for stricter regulation of the cruise industry.

excursions to view native wildlife on and around the continent.⁸⁴ As a result, tourists generally visit the Antarctic region as part of a self-contained cruise expedition where all facilities are provided on board the ship, with shore landings of up to 100 people taking place for between one and three hours at variable intervals.⁸⁵

Both land-based and vessel-sourced marine pollution have been addressed in the context of the Antarctic environment, the legal regulation of which is the subject of the Antarctic Treaty System (ATS).⁸⁶ The core substantive provisions regarding protection of the Antarctic environment are contained within the 1991 Protocol on Environmental Protection to the Antarctic

⁸³ See the CNN website

<<http://cnnstudentnews.cnn.com/2003/US/South/12/19/cruise.dumping.ap/>> and the US Department of Justice website <http://www.usdoj.gov/opa/pr/2002/July/02_enrd_441.htm>.

⁸⁴ In the 2002-03 season more than 13,000 tourists visited Antarctica. For statistics on tourism numbers visiting Antarctica, see the website of the International Association of Antarctica Tour Operators (IAATO) <<http://www.iaato.org/>>. See also, T. Bauer *Tourism in Antarctica: Opportunities, Constraints and Future Prospects* (New York: Hayworth Hospitality Press, 2001); D. Vidas (ed.) *Implementing the Environmental Protection Regime for the Antarctic* (Dordrecht: Kluwer, 2000); B. Boczek 'The Legal Status of Visitors, Including Tourists and Non-governmental Expeditions in Antarctica' in R. Wolfrum *Antarctic Challenge III: Conflicting Interests, Cooperation, Environmental Protection, Economic Development – Proceedings of an Interdisciplinary Symposium, 7-12 July 1987* (Berlin: Duncker & Humblot, 1998); B. Stonehouse 'Ecotourism in Antarctica' in Cater and Lowman (eds.) *Ecotourism: A Sustainable Option?* (Chichester: Wiley, 1994); R.K. Headland 'Historical Development of Antarctic Tourism' 21 *Annals of Tourism Research* (1994) 269; N. Wace 'Antarctica: A New Tourist Destination' 10(4) *Applied Geography* (1990) 327.

⁸⁵ IAATO 'Scope of Antarctic Tourism – A Background Presentation'. Available on the IAATO website <http://www.iaato.org/tourism_overview.html>. Note that a small but increasing minority are now looking for other activities in Antarctica, including sky diving, climbing, surfing, diving, and ski walking.

⁸⁶ The ATS comprises the: 1959 Antarctic Treaty; 1964 Agreed Measures for the Conservation of Antarctic Fauna and Flora; 1972 Convention on the Conservation of Antarctic Seals; 1980 Convention for the Conservation of Antarctic Marine Living Resources; 1988 Convention on the Regulation of Antarctic Mineral Resource Activities; and 1991 Environment Protocol to the Antarctic Treaty. For a discussion on the ATS see e.g. Joyner *Governing the Frozen Commons: The Antarctic Regime and Environmental Protection* (Columbia: University of South Carolina Press, 1998); O.S. Stokke and D. Vidas (eds.) *Governing the Antarctic: The Effectiveness and Legitimacy of the Antarctic Treaty System* (Cambridge: CUP, 1996); F. Francioni and T. Scovazzi (eds.) *International Law for Antarctica* (London: Kluwer Law International, 1996 2nd edition); A. Watts *International Law and the Antarctic Treaty System* (Cambridge: Grotius, 1992); D. Rothwell 'The Antarctic Treaty: 1961-1991 and Beyond' 14 *Sydney Law Review* (1992) 62.

Treaty.⁸⁷ Largely an amalgamation of earlier agreements and recommendations,⁸⁸ the Protocol seeks to commit state parties to the comprehensive protection of the Antarctic environment along with its dependent and associated ecosystems and furthermore, to designate Antarctica as a natural reserve devoted to peace and science.⁸⁹ The main text of the Protocol outlines basic over-arching environmental principles which are then supplemented by six specialist annexes – including a new annex on liability concluded in May 2005.⁹⁰ Although there was some debate regarding the possibility of including an annex on tourism, the idea never reached fruition and, accordingly, tourism activities in the Antarctic Treaty area⁹¹ have been specifically recognised as being subject to the general environmental principles of the Protocol.⁹² Whilst, undoubtedly, a specific Annex regulating Antarctic tourism would have been a welcome addition to the Antarctic Treaty System, it is argued that there is presently in

⁸⁷ For a discussion on the Environment Protocol see e.g. K.Wood 'The Uncertain Fate of the Madrid Protocol to the Antarctic Treaty in the Maritime Area' 34(2) *Ocean Development and International Law* (2003) 139; D.Rothwell 'Polar Environmental Protection and International Law: the 1991 Antarctic Protocol' 11(3) *EJIL* (2000) 591; C.Redgwell 'Environmental Protection in Antarctica: the 1991 Protocol' 43 *ICLQ* (1994) 599; C.Joyner 'The 1991 Madrid Environmental Protocol: Rethinking the World Park Status for Antarctica' 1(3) *RECIEL* (1992) 328; S.Blair 'New Trends in the Protection of the Antarctic Environment: The 1991 Madrid Protocol' (1992) 86 *AJIL* 377.

⁸⁸ See e.g. Recommendation XIV-2 (1987); 1964 Agreed Measures for the Conservation of Antarctic Fauna and Flora; Recommendation XV-3 (1989); Recommendation XV-4.

⁸⁹ Environmental Protocol, article 2.

⁹⁰ Article 3 sets out the Environmental Principles, while the six annexes cover environmental impact assessment, conservation of fauna and flora, waste disposal and management, marine pollution, area protection and management, and liability. The annex on liability, which will operate in conjunction with Article 16 of the Environmental Protocol, was concluded at the ACTM XXVIII held in Stockholm, Sweden in May 2005. There has been much debate between Antarctic Treaty Consultative Members regarding the form liability regulation should take, and also the type of liability regime to be imposed in the Antarctic area. Whilst the specific text has not yet been published, the annex sets out rules regarding the determination of liability for environmental damage, including the cost of clean-up and response action. (See the website <http://www.asoc.org/info_news_0605.htm>.) Until specific details of the liability annex become available it is difficult to determine the impact this will have on tourism in Antarctica. However, it is anticipated that the annex will impose greater obligations on tourist operators, holding them to account for any environmental damage incurred whilst in the Antarctic Treaty area.

⁹¹ Encompasses the area south of 60° south latitude (Article VI, 1959 Antarctic Treaty).

place a comparatively comprehensive regime for the regulation and management of tourism activities in Antarctica. The obligations established in the Environmental Protocol (which applies to *all* activities in the Antarctic Treaty area), together with the work of the International Association of Antarctica Tours Operators (see below) provides a relatively thorough framework which, whilst would benefit from further specific regulation by way of a tourism protocol, is perhaps not in such immediate need of additional specific regulation as other areas of the natural environment.

In respect of pollution of the Antarctic marine environment from land-based sources, activities must comply with the environmental principles of the Protocol.⁹³ In particular, activities in the Antarctic Treaty area must be planned and conducted so as to *limit* adverse impacts on the environment,⁹⁴ and *avoid* significant adverse effects on water quality, and significant changes in the glacial or marine environments.⁹⁵ Annex III of the Protocol on waste disposal and waste management applies to 'activities undertaken in the Antarctic Treaty area pursuant to scientific research programmes, *tourism* and all other governmental and non-governmental activities...'.⁹⁶ However, the type of waste targeted by the Annex is largely orientated towards that created by scientific research stations.⁹⁷ This prioritisation of research-generated waste, combined with the fact that tourism activities in

⁹² E.g. Redgwell, note 87, p. 632-633; P.Beck 'Regulating One of the Last Tourism Frontiers: Antarctica' 10(4) *Applied Geography* (1990) 343.

⁹³ Environmental Protocol, article 3(4).

⁹⁴ Environmental Protocol, article 3(2)(a).

⁹⁵ Environmental Protocol, article 3(2)(b)(ii) and (iii).

⁹⁶ Environmental Protocol, article 1(1), annex III (emphasis added).

⁹⁷ E.g. Article 2 outlines provisions for waste disposal by removal for *inter alia* radio-active materials, electrical batteries, fuel, and wastes containing harmful levels of heavy metals.

the Antarctic area remain predominately ship-based, means that land-based marine pollution from tourism is likely to be regulated primarily by the general environmental principles outlined in the text of the Protocol. However, as Antarctica lacks the level of development and infrastructure commonly associated with coastal tourism destinations (there are no hotels or tourism facilities on the continent),⁹⁸ the particular environmental threats from land-based marine pollution created by, for example, commercial development activities, sewage outfalls, or waste disposal, does not exist. Thus, land-based marine pollution attributable to the Antarctic tourism industry is most likely to come from discarded litter whilst tourists are on-shore, or pollution from the introduction of foreign diseases into the Antarctic environment.⁹⁹ Finally, land-based marine pollution may also be magnified where scientific stations are required to expand their operations in order to cope with increasing demands for tourist visits.¹⁰⁰

Whilst the Environmental Protocol is of only general application to tourism-generated land-based marine pollution, its treatment of vessel-sourced pollution is considerably more comprehensive. Shipping accidents in the polar environment have particularly devastating consequences owing to the sensitive nature of the ecosystem. In 1989 the *Exxon Valdez* disaster in Prince William Sound, Alaska resulted in nearly 11 million gallons of crude

⁹⁸ Note that there have been some initiatives to satisfy tourists' increasing consumer demands, such as a souvenir t-shirt shop on King George Island and the installation of two ATM machines at McMurdo Station (although these are primarily used by scientific personnel). See Polk 'Welcome to the Hotel Antarctica' 12 *Emory International Law Review* (1998) 1401-1402.

⁹⁹ E.g. C. Curry *et al* 'Could Tourists Transmit Infectious Agents in Antarctica?' (Washington: IAATO, 2001), available on the IAATO webpage <http://www.iaato.org/tourists_infect.doc>.

¹⁰⁰ For a discussion on the impact of tourism on scientific research stations, see e.g. D. Enzenbacher 'Tourism at Faraday Station: An Antarctic Case Study' 21(2) *Annals of Tourism Research* (1994) 303.

oil spilling into the Arctic environment, whilst the *Bahia Paraiso* sank off Palmer Station, on the Antarctic Peninsula, releasing around 250,000 gallons of diesel fuel and other petroleum products into the surrounding area.¹⁰¹ Thus, not only do legal provisions regarding vessel-sourced pollution need to address the standard operational discharges from ships, they also must provide for the threat posed by maritime accidents.

The Environmental Protocol has a specific Annex on the Prevention of Marine Pollution which is to be read in addition to the general environmental provisions set out in the main body of the Protocol.¹⁰² The Annex effectively aims to introduce to the Antarctic environment similar standards as those established in MARPOL.¹⁰³ The discharge of oil,¹⁰⁴ noxious liquid substances,¹⁰⁵ garbage,¹⁰⁶ and sewage¹⁰⁷ is prohibited, although loopholes exist within the Annex for exploitation.¹⁰⁸ Moreover, Antarctica has been accorded 'special area' status in respect of Annexes I and V of MARPOL, effectively prohibiting the discharge of the most polluting substances in the area.¹⁰⁹ In addition to these legislative

¹⁰¹ M.Canmann 'Antarctic Oil Spills of 1989: A Review of the Application of the Antarctic Treaty and the New Law of the Sea to the Antarctic Environment' *Colorado Journal of International Environmental Law and Policy* (1990) 211; D.Shaw 'The Exxon Valdez Oil-spill: Ecological and Social Consequences' 19(3) *Environmental Conservation* (1992) 253.

¹⁰² Environmental Protocol, annex IV.

¹⁰³ Rothwell, note 87, p. 605-606.

¹⁰⁴ Environmental Protocol, article 3, annex IV. The discharge of oil or oily mixture is permitted where in accordance with Annex I of MARPOL.

¹⁰⁵ Environmental Protocol, article 4, annex IV.

¹⁰⁶ Environmental Protocol, article 5, annex IV.

¹⁰⁷ Environmental Protocol, article 6, annex IV.

¹⁰⁸ The prohibitions listed in the above sections are all subject to exceptions where for example, oil is discharged as a result from damage to a ship where all reasonable precautions have been taken (Article 3(2)(a)(i)); garbage escapes as a result of damage to a ship where all reasonable precautions have been taken (Article 5(5)); it would unduly impair Antarctic operations to eliminate the discharge of untreated sewage within 12 miles of land or ice shelves (Article 6(1)). Furthermore, none of the provisions of the Annex apply in cases of emergency (Article 7(1)); or to any warship or other ship owned or operated by a State and used only on government non-commercial service (Article 11(1)).

¹⁰⁹ 1990 MARPOL amendments, entered into force 17 March 1992.

provisions, there has been much debate regarding the adoption of specific Antarctic shipping guidelines to provide operators with further direction and support, although nothing has yet been concluded.¹¹⁰ Antarctic marine pollution may also be addressed by the Protocol's environmental impact assessment (EIA) requirement for tourism activities having a 'minor or transitory impact' on the Antarctic environment.¹¹¹ However, the type of environmental damage likely to be caught under this requirement most probably relates more to biodiversity than pollution, and as such, will be discussed in greater detail below. Finally, in response to environmental emergencies in the Antarctic Treaty area, the Protocol requires state parties to provide prompt and effective response action and establish contingency plans for incidents with potential adverse effects on the Antarctic environment or dependent and associated ecosystems.¹¹²

The importance of these marine pollution provisions becomes apparent when the extent of the Antarctic cruise industry is exposed. Approximately 85 percent of visitors to Antarctica during the 2002-03 season were cruise ship passengers, comprising more than 130 individual voyages to the Antarctic Treaty area.¹¹³ Furthermore, more than 90 percent of visitors landed on sites located on the Antarctic Peninsula, significantly consolidating the number of vessels in one area.¹¹⁴ With the carrying capacity of some ships in the Antarctic now exceeding 1,000 passengers,¹¹⁵

¹¹⁰ The IMO has draft Guidelines for Ships Operating in Arctic Ice covered Waters. See the IMO website <<http://www.imo.org/>>.

¹¹¹ Environmental Protocol, article 8 and annex I.

¹¹² Environmental Protocol, article 15(1).

¹¹³ See the IAATO website <<http://www.iaato.org/tourismstatistics/PAX0203.xls>>.

¹¹⁴ See the IAATO website <<http://www.iaato.org/tourismstatistics/SumPenSites2003.xls>>.

¹¹⁵ E.g. the Orient Lines ship, *Marco Polo* has capacity for 826 passengers and usually carries approximately 350 staff and crew.

the same vessel pollution issues that face standard cruise ships, such as sewage, grey water, garbage, and chemical waste disposal, are similarly prevalent in the Antarctic environment.

In addition to the legal obligations regarding marine pollution described above, there also exists a voluntary member organisation – the International Association of Antarctica Tours Operators (IAATO) – which establishes guidelines and operational procedures for tour operator members.¹¹⁶ The Association endorses the provisions set down in the ATS, as well as providing further elaboration on more specific procedures.¹¹⁷ In particular, IAATO outlines ‘guidance for those organising and conducting tourism and non-governmental activities in the Antarctic’, including details on procedures to be undertaken prior to departure, behaviour whilst in the Antarctic Treaty area, and post-visit reporting requirements.¹¹⁸ Before departure, tour operators must provide advance notice to the competent national authority of the planned activities, conduct environmental assessments and provide the necessary information regarding waste management and marine pollution, and obtain any entry permits required by the Environmental Protocol. On completion of the visit, operators must then submit an Antarctic post-visit report form to the competent national authority outlining details of expedition members, the sites visited, and the activities undertaken.¹¹⁹ Whilst the IAATO is a voluntary member organisation, it offers valuable guidance and support for Antarctic tour

¹¹⁶ See the website of the IAATO at <<http://www.iaato.org/>>. The IAATO is a ‘member organization founded in 1991 to advocate, promote and practice safe and environmentally responsible private-sector travel to the Antarctic’.

¹¹⁷ See the IATO website <http://www.iaato.org/tourop_guide.html>.

¹¹⁸ See ATCM Recommendation XVIII-I (adopted at Kyoto 1994).

¹¹⁹ See the IAATO website <http://www.iaato.org/tourop_guide.html>.

operators and demonstrates a notable level of persuasion in affecting compliance by industry participants.

Marine pollution poses a real and significant threat to the environment and is exacerbated by activities within the tourism industry. However, there now exists a comprehensive international regulatory regime in respect of marine pollution and its subsequent impact on the natural environment, which also clearly takes into consideration the activities and operators within the tourism industry. Accordingly, many aspects of the tourism industry are regulated and managed by the marine pollution requirements established in international environmental law.

3.1.2 Atmospheric Pollution

A second major problem related to tourism is atmospheric pollution. There exist numerous international agreements regarding environmental protection of the atmosphere.¹²⁰ Early concerns regarding atmospheric pollution centred on transboundary pollution, often the product of fossil fuel combustion from industrialisation (such as sulphur dioxide and nitrogen oxides) resulting in transboundary acid deposition.¹²¹ However, the regional

¹²⁰ For a general discussion on international environmental protection of the atmosphere, see e.g.: Sands, note 1, ch. 8; Birnie and Boyle, note 3, ch. 10; P. Okowa *State Responsibility for Transboundary Air Pollution in International Law* (Oxford: OUP, 2000); R. Churchill and D. Freestone (eds.) *International Law and Global Climate Change* (London: Graham & Trotman, 1991); C. Flinterman, B. Kwiatkowska and J. Lammers (eds.) *Transboundary Air Pollution: International Legal Aspects of the Co-operation of States* (Dordrecht: M. Nijhoff, 1986).

¹²¹ On acid deposition see e.g. J. Brunnée *Acid Rain and Ozone Layer Depletion: International Law and Regulation* (Dobbs Ferry: Transnational Publishers, 1988); Flinterman, Kwiatkowska and Lammers, note 120; I. Van Lier *Acid Rain and International Law* (Toronto: Bunsel, 1981). The resulting legal framework is the 1979 Convention on Long-range Transboundary Air Pollution (and its eight protocols). For a discussion on the Convention see e.g. Birnie and Boyle, note 3, p. 508-513; R. Churchill, K. Küting and L. Warren 'The 1994 UNECE Sulphur Protocol' 7(2) *JEL* (1995) 169; A. Fraenkel 'The

and transboundary focus has now given way to a global emphasis, with climate change and ozone depletion being the central concern in respect of atmospheric pollution – although the interrelated nature of these problems remains apparent. By its very nature, the tourism industry is a significant contributor to atmospheric pollution given the high levels of industrial development and transportation (most often associated with fossil fuel consumption) required to facilitate tourist activities. Accordingly, the extent to which international environmental law regulates air pollution activities will have a notable impact on tourism. Whilst there are a number of treaties regulating various types of atmospheric pollution,¹²² global climate change and ozone depletion provide the most prominent examples that are relevant to the tourism industry.

(a) Global Climate Change

The problem of global climate change has been addressed in the international arena primarily by way of the 1992 Framework Convention on Climate Change (UNFCCC).¹²³ Concluded in response to the global threat identified by the Intergovernmental Panel on Climate Change (IPCC),¹²⁴ the UNFCCC is remarkable for the fact that it was negotiated by virtually the

Convention on Long-range Transboundary Air Pollution: Meeting the Challenge of International Cooperation' 30(2) *Harvard International Law Journal* (1989) 447.

¹²² E.g. 1979 Convention on Long Range Transboundary Air Pollution (18 ILM 1442) and its eight protocols; 1967 Outer Space Treaty (610 UNTS 205); 1979 Moon Treaty (18 ILM 1434).

¹²³ For a general discussion on climate change and the 1992 Convention (31 ILM 849) see, e.g.: 11(2) *RECIEL* (2002) (special issue on climate change); T.O'Riordan and J.Jäger (eds.) *Politics of Climate Change: A European Perspective* (London: Routledge, 1996); I.Mintzer and A.Leonard (eds.) *Negotiating Climate Change: the Inside Story of the Rio Convention* (Cambridge: CUP, 1994); D.Bodansky 'The UN Framework Convention on Climate Change: A Commentary' 18(2) *Yale Journal International Law* (1993) 451; P.Sands 'The United Nations Framework Convention on Climate Change' 1 *RECIEL* (1992) 270; and the UNFCCC website <<http://unfccc.int/>>.

entire international community and thus represents an agreement comprising the interests and values of many different states.¹²⁵ The ultimate objective of the Convention is to achieve 'stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'.¹²⁶ All state parties to the UNFCCC are required to satisfy general commitments (taking into consideration their common but differentiated responsibilities), including the development of national inventories of anthropogenic emissions, programmes containing measures to mitigate climate change, technologies to manage anthropogenic emissions of greenhouse gases, and general principles of cooperation and integration.¹²⁷ Developed state parties (Annex I states) are called upon to make additional commitments under the Convention to limit anthropogenic emissions of greenhouse gases with the aim of returning to their 1990 emission levels, although the wording of this section is highly ambiguous, consequently reducing the impact of this commitment.¹²⁸

Supplementing the provisions and commitments established in the UNFCCC is the 1997 Kyoto Protocol.¹²⁹ The aim of the Protocol is to

¹²⁴ IPCC First Assessment Report (1990). See the IPCC website <<http://www.ipcc.ch/pub/reports.htm>>.

¹²⁵ 143 states were involved in the final treaty negotiations and there are currently 188 states parties to the Convention. See the UNFCCC website <<http://unfccc.int/resource/conv/ratlist.pdf>>.

¹²⁶ UNFCCC, article 2.

¹²⁷ UNFCCC, article 4(1).

¹²⁸ UNFCCC, article 4(2).

¹²⁹ For a discussion on the Kyoto Protocol (37 ILM 22) see, e.g.: S.Oberthür and H.Ott *The Kyoto Protocol: International Climate Policy for the 21st Century* (London: Springer, 1999); M.Grubb *The Kyoto Protocol: A Guide and Assessment* (London: Earthscan, 1999); P.Davies 'Global Warming and the Kyoto Protocol' 47 *ICLQ* (1998) 446; D.French '1997 Kyoto Protocol to the 1992 UN Framework Convention on Climate Change' 10(2) *JEL* (1998) 227; F.Yamin 'The Kyoto Protocol: Origins, Assessment and Future Challenges' 7(2) *RECIEL* 113.

strengthen commitments for developed state parties by setting 'quantified limitation and reduction objectives within specified time-frames' for anthropogenic emissions.¹³⁰ This objective is realised in the text of the Protocol as a commitment for Annex I states to ensure that their anthropogenic emissions of greenhouse gases¹³¹ do not exceed the assigned amounts, 'with a view to reducing overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012'.¹³² Whilst most states agreed to specific reduction targets (for example, the EU agreed to an 8 per cent reduction while the US accepted 7 per cent), some states were permitted to make increases (Australia was allowed an 8 per cent increase and similarly, Iceland 10 per cent).¹³³ Furthermore, the Protocol establishes various mechanisms and techniques to aid states in reaching their reduction targets.¹³⁴ The Kyoto Protocol entered into force on 16 February 2005 following the ratification of Russia in late 2004.¹³⁵

¹³⁰ Decision 1/CP.1. Report of the Conference of the Parties on its First Session. Berlin. 1995. FCCC/CP/1995/7/Add.1. paragraph 2(a) (the 'Berlin Mandate').

¹³¹ Six greenhouse gases are covered by the Protocol, namely carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulphur hexafluoride: Kyoto Protocol, annex A.

¹³² Kyoto Protocol, article 3(1).

¹³³ Kyoto Protocol, article 3(1) and annex B.

¹³⁴ For an overview of Kyoto's flexibility mechanisms (joint implementation, the clean development mechanism and emissions trading) see e.g. F.Missfeldt 'Flexibility Mechanisms: Which Path to Take after Kyoto?' 7(2) *RECIEL* (1998) 128; M.Grubb 'International Emissions Trading under the Kyoto Protocol: Core Issues in Implementation' 7(2) *RECIEL* (1998) 140; J.Werksman 'The Clean Development Mechanism: Unwrapping the 'Kyoto Surprise'' 7(2) *RECIEL* (1998) 147.

¹³⁵ Article 25 of the Protocol provides that in order to enter into force, the Protocol must be ratified by Annex I states which contribute at least 55 per cent of the total carbon dioxide emissions for 1990. Ratification by Russia increased this emission limit requirement to 61.6 per cent, thereby facilitating the Protocol's entry into force. The first conference of the parties to act as the meeting of the parties is scheduled for November 2005.

The relationship between tourism and climate change has now been addressed on numerous occasions.¹³⁶ The direct impacts of climate change on tourism are visible by increasing temperatures, rising sea-levels, increased precipitation, and an elevated snow line, whilst indirect impacts include conflict over water resources, health effects, and impacts on the built environment.¹³⁷ Small island states – usually heavily reliant on tourism – provide one of the most obvious examples of an environment threatened by climate change, with beach erosion, high sea levels, damage from sea surges and storms, and reduced water supply contributing to their island's environmental problems.¹³⁸ The tourism industry is inherently highly dependent on fossil fuels and is thus responsible for a significant volume of greenhouse gas emissions. For example, in France, domestic and international tourism now accounts for seven to eight per cent of the country's total road transport emissions.¹³⁹ The World Tourism Organisation acknowledged the link between climate change and tourism in

¹³⁶ E.g. WTO *Climate Change and Tourism* Proceedings of the 1st International Conference on Climate Change and Tourism, Tunisia, April 2003 (available on the website <<http://www.world-tourism.org/sustainable/climate/final-report.pdf>>); D.Viner and B.Amelung *Climate Change, the Environment and Tourism: The Interactions* Proceedings of the ESF-LESC Workshop, Milan, June 2003; Papers submitted to the NATO Workshop on Climate Change and Tourism: Assessment and Coping Strategies, Warsaw, November 2003 (available on the website <<http://www.icis.unimaas.nl/workshop/nato/intro.html>>); D.Viner 'Climate Change Mitigation Policies and the Global Tourism Industry' *Climate Change Management* (2003) 12; A.Matzarakis and C.de Freitas (eds.) Proceedings of the First International Workshop on Climate, Tourism and Recreation, Greece, October 2001 (available on the website <<http://www.mif.uni-freiburg.de/isb/>>).

¹³⁷ Viner, *ibid.*, p. 12. Note however, that climate change may be considered to provide a benefit for tourism, where some countries are enjoying warmer climatic conditions more favourable to the tourism industry.

¹³⁸ A.Gillespie 'Small Island States in the Face of Climatic Change: The End of the Line in International Environmental Responsibility' 22 *UCLA Journal of Environmental Law and Policy* (2003-04) 107. Also note the impact of climate change on the Maldives, where the highest point of the islands is just eight feet above sea level – a one degree rise in temperature would kill the coral reef, exposing the islands to the ocean. See R.Ross 'Splash Out in Style' *The Independent (Independent Traveller)* (21 February 2004) at 11; N.Bryant 'Maldives: Paradise Soon to be Lost' *BBC News* 28 July 2004 at <http://news.bbc.co.uk/1/hi/world/south_asia/3930765.stm>. The Small Island Developing States Network has addressed the issue of climate change, see its website <<http://www.sidsnet.org/>>.

2003 by convening the first international conference on the relationship,¹⁴⁰ providing an opportunity for tourism participants and scientists to 'exchange views on the consequences, opportunities and risks presented to the tourism sector as a result of changes in the world's climate'.¹⁴¹ The conference participants¹⁴² (somewhat predictably) reiterated the scientific uncertainties surrounding global climate change and recognised the two-way relationship between tourism and climate change.¹⁴³ The resulting Djerba Declaration on Tourism and Climate Change addresses this relationship and urges governments to subscribe to 'all relevant intergovernmental and multilateral agreements, especially the Kyoto Protocol...', to prevent this phenomenon from spreading further or accelerating.¹⁴⁴ In addition to promoting the standard environmental requirements of further research, financial support, technical assistance, awareness, and information exchange,¹⁴⁵ the Declaration encourages participants within the tourism industry to 'adjust their activities, using more energy-efficient and cleaner technologies and logistics, in order to minimise as much as possible their contribution to climate change'.¹⁴⁶ Despite its non-binding legal status and largely non-contentious principles, the Djerba Declaration offers an important framework within which global, national and regional organisations can address the relationship between tourism and climate change, and

¹³⁹ WTO, note 136, p. 36.

¹⁴⁰ The Conference was held in Djerba, Tunisia from 9 to 11 April 2003. Proceedings of the Conference are available on the WTO website <<http://www.world-tourism.org/sustainable/climate/final-report.pdf>>.

¹⁴¹ WTO, note 136, p. 5.

¹⁴² Comprised of 140 delegates from 45 countries, including representatives from the scientific community, UN agencies, the tourism industry, NGOs, national tourism offices, national and local governments.

¹⁴³ WTO, note 136, p. 7-8.

¹⁴⁴ WTO Djerba Declaration on Tourism and Climate Change, paragraph 1.

¹⁴⁵ WTO Djerba Declaration on Tourism and Climate Change, respectively paragraphs 2, 3, 7, 8 and 9.

¹⁴⁶ WTO Djerba Declaration on Tourism and Climate Change, paragraph 5.

implement appropriate structures for the regulation and management of the tourist industry.

Following the international recognition of the link between tourism and climate change, it is apparent that in meeting their international commitments under the Climate Change Convention and the Kyoto Protocol, states will need to address aspects of the tourism industry and apply relevant national policies and practices to tourist activities. A significant component of tourism – and reportedly one of the fastest growing contributors to global greenhouse gas emission – is the aviation industry.¹⁴⁷ An integral aspect of the global tourism industry, air transport has been estimated to be between two and four more times polluting (per passenger carried) than road transport.¹⁴⁸ The impact of aviation on the global atmosphere has been explored by the IPCC and its findings¹⁴⁹ have subsequently been adopted by the International Civil Aviation Organisation (ICAO).

The ICAO was established by the 1944 Chicago Convention on International Civil Aviation (ICA Convention).¹⁵⁰ Although much of the Convention sets out the boundaries for civil aviation law, a number of international standards and recommended practices are outlined in the various Annexes to the Convention, including one which focuses on

¹⁴⁷ 'Do Airplanes Contribute Significantly to Air Pollution?' *Environmental News Network* 7 September 2004 at <http://www.enn.com/news/2004-09-07/s_26774.asp>; Climate Change Management (2003) 9 at 12.

¹⁴⁸ WTO, note 136, p. 36.

¹⁴⁹ J. Penner, D. Lister, D. Griggs, D. Dokken and M. McFarland (eds.) *Aviation and the Global Atmosphere* (Cambridge: CUP, 1999).

environmental protection.¹⁵¹ In 2001 the ICAO Assembly adopted Resolution A33-7, recognising the environmental impact of civil aviation on the atmosphere and reinforcing the objectives of the Climate Change Convention and Kyoto Protocol.¹⁵² The Resolution requests the ICAO Council to continue to study policy options to limit or reduce the environmental impact of aircraft engine emissions and calls for special emphasis to be placed on the 'use of technical solutions while continuing its consideration of market-based measures, and taking into account potential implications for developing as well as developed countries'.¹⁵³ Furthermore, the Kyoto Protocol specifically recognises the significance of aircraft engine emissions by requiring Annex I parties to limit or reduce emissions of greenhouse gases from aviation (and marine) bunker fuels, working through the ICAO.¹⁵⁴

The projected growth of aviation and its subsequent role in climate change¹⁵⁵ has been identified and addressed within international law. Much relies on technological advancement of the aviation industry to reduce the quantity and improve the quality of aircraft engine emissions and consequently, the associated environmental impact. States, international organisations, and scientific bodies are encouraged to continue research into

¹⁵⁰ For a general discussion on the Convention see e.g. I.Diederiks-Verschoor *An Introduction to Air Law* (Hague: Kluwer, 1997 6th edition); B.Cheng *The Law of Air Transport* (London: Stevens, 1962).

¹⁵¹ Annex 16 to the ICA Convention outlines 'Environmental Protection' incorporating aircraft noise (volume 1) and aircraft engine emissions (volume 2).

¹⁵² A33-7: Consolidated Statement of Continuing ICAO Policies and Practices Related to Environmental Protection, Appendix H. Adopted by the ICAO Assembly, October 2001.

¹⁵³ Consolidated Statement of Continuing ICAO Policies and Practices Related to Environmental Protection, paragraph 3, appendix H, A33-7.

¹⁵⁴ Kyoto Protocol, article 2(2). Note there is some uncertainty as how the treatment of domestic and international aviation under the UNFCCC process should be managed. See the ICAO Statement to the 9th Session of the Conference of the Parties to the UNFCCC, Milan, December 2003.

this area, with the view to minimising climatic change.¹⁵⁶ In this sense, the aviation industry, which plays a significant role within tourism, is being shaped and influenced by elements of international environmental law.

(b) Ozone Depletion

The discovery in 1985 of a hole in the ozone layer over Antarctica reignited concern regarding the world-wide use of ozone depleting substances (ODS).¹⁵⁷ The anthropogenic emission of ODS¹⁵⁸ results in a thinning of the protective ozone layer and consequently creates numerous risks to humans and the natural environment, including skin cancer and eye damage from ultraviolet-B radiation, reduced plant growth, degenerative effects on animal life, aggravated environmental pollution, and contributions to global climate change.¹⁵⁹ In order to halt the growing ozone hole over Antarctica and repair the damage done to the ozone layer, the international community introduced measures to reduce (and eventually prevent) the emission of ODS into the global atmosphere.

¹⁵⁵ Penner, Lister, Griggs, Dokken and McFarland, note 149.

¹⁵⁶ The UK has launched a discussion round on 'Aviation and the Environment: Using Economic Instruments'. See Morrissey 'UK Says Aviation Industry Should Pay Pollution Costs' (17 March 2003) available at <<http://www.planetark.com/dailynewsstory.cfm/newsid/20183/newsDate/17-Mar-2003/story.htm>>.

¹⁵⁷ J. Farman, B. Gardiner and J. Shanklin 'Large Losses of Total Ozone in Antarctica Reveal Seasonal C10x/NOx Interaction' 315 *Nature* (1985) 207-210.

¹⁵⁸ Common ODS include chlorofluorocarbons (CFCs), Hydrochlorofluorocarbons (HCFCs), Carbon tetrachloride, Methyl chloroform, Methyl bromide, and Bromochloromethane. For a full list of controlled ODS see the 1987 Montreal Protocol.

¹⁵⁹ For further discussion see e.g. Ozone Secretariat *Action on Ozone* (Nairobi: UNEP, 2000).

Ozone depleting substances are used extensively within the tourism industry.¹⁶⁰ Especially prominent in hotels and tourism infrastructure, ODS can be found in food and drink refrigerators,¹⁶¹ mini-bars,¹⁶² air conditioning systems in general amenity areas and individual room units,¹⁶³ aerosols used for cleaners,¹⁶⁴ and fire extinguishers.¹⁶⁵ In addition, ancillary tourism activities employing ODS include air conditioning units in vehicles,¹⁶⁶ dry cleaning applications,¹⁶⁷ and plastic foam products¹⁶⁸ (such as food packaging, head rests, bedding and upholstery, and vehicle interiors). Accordingly, tourism exhibits great potential for contributing towards the depletion of the ozone layer as a result of the substances utilised by actors within the industry. Moreover, the tourism industry has a vested interest in restoring and replenishing the ozone layer as many destinations are reliant on climatic conditions and tourists enjoying the sun, which excessive ultraviolet radiation would otherwise render dangerous.¹⁶⁹

The Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol on Substances that Deplete the Ozone Layer¹⁷⁰ recognise

¹⁶⁰ For an overview see UNEP *How the Hotel and Tourism Industry Can Protect the Ozone Layer* (Paris: UNEP, 1988).

¹⁶¹ CFCs. See UNEP. *ibid.*, p. 14-16.

¹⁶² *Ibid.*

¹⁶³ HCFC-22. *Ibid.*, p. 17.

¹⁶⁴ CFCs. *Ibid.*, p. 20.

¹⁶⁵ Halons. *Ibid.*, p. 21.

¹⁶⁶ CFC-12. *Ibid.*, p. 18.

¹⁶⁷ CFC-113 and methyl chloroform, *Ibid.*, p. 19.

¹⁶⁸ CFCs, *Ibid.*, p. 20.

¹⁶⁹ See details of World Health Organisation's INTERSUN Programme, which has published guidelines for tour operators on minimising the risks associated with ultraviolet radiation exposure, on the WHO website <
<http://www.who.int/uv/intersunprogramme/activities/uvtourism/en/>>.

¹⁷⁰ For a discussion on the Vienna Convention (26 ILM 1529) and the Montreal Protocol (26 ILM 154) see e.g. Birnie and Boyle, note 3, p. 517-521; Churchill and Freestone, note 120, ch. 1; J.Patlis 'The Multilateral Fund of the Montreal Protocol: A Prototype for Financial Mechanisms in Protecting the Global Environment' 25 *Cornell International Law Journal* (1992) 181; E.Barratt-Brown 'Building a Monitoring and Compliance Regime Under the Montreal Protocol' 16 *Yale Journal of International Law* (1991) 520;

the potential for global environmental degradation by ozone depleting substances and establish targets for the reduction and eventual elimination of such substances. The Vienna Convention is significant in that it represents the first initiative by states to address a global environmental problem without conclusive scientific evidence of its harmful effects (thereby employing the principle of precaution). It also had to reconcile the interests of both developed and developing countries. Created as a framework agreement, the only substantive obligations established by the Vienna Convention relate to the research and systematic observation of human activities on the ozone layer, the transmission of information between parties, and legal, scientific and technical cooperation.¹⁷¹ The specific provisions introducing control measures for the consumption and production of ODS were introduced in the Montreal Protocol, which sets out the specific rights and obligations for state parties. A timetable is established within the Protocol, which creates targets for the reduction and eventual elimination of ODS by way of a phase-out schedule for individual substances,¹⁷² whilst subsequent amendments to the Protocol have added further substances to this phase-out process.¹⁷³ The majority of ODS have now been successfully phased out by developed countries,¹⁷⁴ although in

P.Lawrence 'International Regulation for Protection of the Ozone Layer: Some Problems of Implementation' 2(1) *JEL* (1990) 17.

¹⁷¹ Vienna Convention, articles 2, 3, 4 and 5.

¹⁷² Montreal Protocol, article 2. Phase-out schedules are outlined for CFCs, halons, other fully halogenated CFCs, carbon tetrachloride, 1,1,1-Trichloroethane (methyl chloroform), hydrochlorofluorocarbons, hydrobromofluorocarbons, methyl bromide, and bromochloromethane: Montreal Protocol, articles 2A to 2I.

¹⁷³ Additional ODS were incorporated to the Protocol's provisions by the 1990 London Amendment, the 1992 Copenhagen Amendment, and the 1999 Beijing Amendment. (The 1997 Montreal Amendment established an import/export licensing system for ODS).

¹⁷⁴ Remaining ODS to be phased-out include methyl bromide by 2005 and HCFCs by 2030.

accordance with the Protocol, developing states have a longer phase out period.¹⁷⁵

The implications of the Vienna Convention and Montreal Protocol on the tourism industry extend to the use of ODS in tourism operations (as described above). Essentially, participants within the industry will be required to act on three different levels: containment and conservation, retrofitting, and replacement.¹⁷⁶ On the most basic level, 'good housekeeping' measures are required to avoid ODS leakage or loss during equipment operation and to ensure regular maintenance is undertaken. Next, due to the production phase-out of ODS, tourism operations are required to convert existing equipment using ODS (e.g. replace existing equipment parts), and eventually, purchase new replacement equipment that does not contain any ODS.¹⁷⁷

The international legal norms regarding ODS and their subsequent effect on the natural environment do have an impact on the tourism industry, mostly in respect of hotels and tourist infrastructure. The issue of ozone depletion may not be as prominent, or tangible, as climate change in respect of tourism activities, with emissions from the global aviation industry seemingly more significant than those from refrigerators in hotel rooms. However, international environmental law has had a measurable impact on the tourism industry in respect of eliminating both the production and consumption of ODS, thereby forcing tourist operators to convert and

¹⁷⁵ Developing countries with consumption of ODS lower than the limits specified in the Protocol are entitled to a ten year delay: Montreal Protocol, article 5.

¹⁷⁶ UNEP, note 160, p. 12.

replace existing equipment in order to comply with international legal standards. As is the case of marine pollution, the tourism industry both contributes to global atmospheric pollution through its various emission sources, and is also largely shaped by the international environmental law regulating such environmental pollution.

3.2 Biological Diversity

Following the examination of environmental pollution and its relationship with the tourism industry, discussion now turns to the second area of international environmental law that impacts on the regulation and management of tourism activities – the conservation of biological diversity. The concept of biological diversity (or biodiversity) is understood to encompass the diversity of ecosystems, the diversity of species, and the genetic diversity within species.¹⁷⁷ Thus, the concept adopts a broad definition reflecting the variety and variability within species and ecosystems, rather than referring to specific natural resources.¹⁷⁹ Threats to biodiversity are predominately derived from human activities, such as habitat destruction (from agriculture and industrial development) and resource consumption (from hunting, collection and exploitation). Moreover, the indirect ecological consequences of many of these threats are equally as devastating for associated biodiversity components where, for

¹⁷⁷ *Ibid.*

¹⁷⁸ M.Bowman 'The Nature, Development and Philosophical Foundations of the Biodiversity Concept in International Law' in M.Bowman and C.Redgwell (eds.) *International Law and the Conservation of Biological Diversity* (London: Kluwer, 1996); P. van Heijnsbergen *International Legal Protection of Wild Fauna and Flora* (Amsterdam: IOS Press, 1997) 197-199. This understanding of biodiversity was also the one adopted by Article 2 of the Convention on Biological Diversity.

¹⁷⁹ For a discussion on the difference between 'natural resources' and biological diversity' see Birnie and Boyle, note 3, p. 549.

example, '...the destruction and loss of habitats and species...[threaten]...the ability of ecosystems to purify water, regenerate soil, protect watersheds, regulate temperature, recycle nutrients and waste, and maintain the atmosphere.'¹⁸⁰ Accordingly, an ecosystem approach to conservation is often adopted in respect of the regulation and management of biodiversity, in order to ensure that both direct and indirect ecological consequences are addressed.

International law has been used as a mechanism to regulate biodiversity for centuries, with forestry conservation laws for Babylon identified in 1900 BC, the creation of an Egyptian nature reserve declared in 1370 BC, and the prohibition on killing certain animals established in India during the third century BC.¹⁸¹ In more recent years, the idea of biodiversity has received much attention within the field of international environmental law,¹⁸² although the terminology of 'biodiversity' is not included in agreement texts until the conclusion of the 1992 Convention on Biological Diversity. The threat to biodiversity posed by increasing human activity has, however, been recognised by the international community for a number of years and the Biodiversity Convention can, to some extent, be seen as an accumulation of earlier conservation attempts.

Many of the threats to biodiversity posed by anthropocentric activities are attributable to the tourism industry. The natural environment is a key draw-

¹⁸⁰ Sands, note 1, p. 499.

¹⁸¹ S.Lyster *International Wildlife Law: An Analysis of International Treaties Concerned with the Conservation of Wildlife* (Cambridge: Grotius, 1985) xxi.

¹⁸² E.g. 1968 African Convention on the Conservation of Nature and Natural Resources; 1972 Stockholm Declaration on the Human Environment; 1980 World Conservation Strategy; 1982 World Charter for Nature.

card for tourists and thus the on-going development of tourism infrastructure and the consumption of natural resources continue to threaten global biodiversity. The Convention on Biological Diversity outlines the general provisions for conservation and, furthermore, acknowledges the relationship between biodiversity and tourism in a set of supplementary guidelines.¹⁸³ The vast body of biodiversity-orientated agreements can be divided into two groups: species protection and habitat preservation. Whilst this division is somewhat artificial (the conservation of a particular species could be formulated around its habitat preservation), it allows for tourism to be evaluated for present purposes, in light of the impact it has on a species, or habitat, and the corresponding approach taken by the international legal community in addressing the relationship.

3.2.1 General Provisions on the Conservation of Biodiversity

The conservation of biodiversity has been addressed in numerous ways and at various levels over recent years. Whilst regimes responsible for addressing specific aspects of biodiversity – such as species protection and habitat preservation – are discussed in detail below, first the more generally applicable provisions addressing the conservation of biodiversity are examined. These provisions have both global and regional scope.

¹⁸³ The CBD Guidelines on Biodiversity and Tourism Development are available on the webpage <<http://www.biodiv.org/programmes/socio-eco/tourism/guidelines.asp>>.

(a) Global Scope

Many of the general global provisions regarding the conservation of biological diversity are established in the 1992 Convention on Biological Diversity (CBD).¹⁸⁴ The objective of the 188 state parties¹⁸⁵ to the CBD is '...the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources...'.¹⁸⁶ The Convention defines the term 'biological diversity' very widely and in fact, extends its scope to include biological resources, biotechnology, and genetic material.¹⁸⁷ The general obligations under the CBD include international cooperation in respect of areas beyond national jurisdiction¹⁸⁸ and the development (or adaptation) of national strategies for the conservation and sustainable use of biodiversity.¹⁸⁹ More specific responsibilities set out within the Convention include the requirement of each state to identify and monitor components of biodiversity important for its conservation and sustainable use,¹⁹⁰ and the establishment of protected areas where special measures are taken to conserve biodiversity.¹⁹¹

Whilst state parties are obliged to adhere to the prescribed conservation measures, it is the Convention's adoption of the 'sustainable use' principle

¹⁸⁴ See the website of the CBD at <<http://www.biodiv.org/>>. For a discussion on the Convention see e.g.: Secretariat of the CBD *Handbook of the Convention on Biological Diversity* (Montreal: CBD, 2003) (2nd ed); D.McGraw 'The CBD – Key Characteristics and Implications for Implementation' 11(1) *RECIEL* (2002) 17; A.Boyle 'The Rio Convention on Biological Diversity' in M.Bowman and C.Redgwell (eds.) *International Law and the Conservation of Biological Diversity* (London: Kluwer, 1996).

¹⁸⁵ Participation to the CBD is detailed on the website <<http://www.biodiv.org/world/parties.asp>>.

¹⁸⁶ CBD, article 1.

¹⁸⁷ CBD, article 2.

¹⁸⁸ CBD, article 5.

¹⁸⁹ CBD, article 6.

¹⁹⁰ CBD, article 7.

that is of particular interest. Sustainable use involves the 'use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations'.¹⁹² The link between tourism and biodiversity has been identified by the CBD subsidiary body on Scientific, Technical and Technological Advice (SBSTTA),¹⁹³ which focuses on tourism as one example of sustainable use.¹⁹⁴ The SBSTTA has discussed the relationship between tourism and the natural environment, highlighting both the potential environmental and socio-economic impacts on biological diversity from tourism.¹⁹⁵ Notably, however, the SBSTTA advocates the CBD as a '...framework for the development of policy options for sustainable tourism, which would promote the conservation and sustainable use of biological diversity'.¹⁹⁶ In considering the CBD as an ideal framework from which to address tourism, the SBSTTA adopts the three objectives of the CBD – that is the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of the benefits – as the guiding principles for sustainable tourism. Each of the main provisions of the Convention are then subsequently evaluated in respect of how these might be applied to develop policy options for sustainable tourism, which in turn, would also promote the conservation and sustainable use of biological

¹⁹¹ CBD, article 8.

¹⁹² CBD, article 2.

¹⁹³ The SBSTTA is a subsidiary body of the Conference of the Parties established under article 25 of the CBD. Its functions include: providing assessments of the status of biological diversity; assessments of the types of measures taken in accordance with the provisions of the Convention; and respond to questions that the COP may put to the body. For details of SBSTTA documents and reports see <<http://www.biodiv.org/convention/sbstta.asp>>.

¹⁹⁴ UNEP/CBD/SBSTTA/4/11 – Development of Approaches and Practices for the Sustainable Use of Biological Resources, Including Tourism.

¹⁹⁵ *Ibid.*, paragraphs 14-29.

diversity. The initial analysis by the SBSTTA was supplemented in 2001 by the Workshop on Biodiversity and Tourism, convened to explore further the applicability of the CBD to tourism, and draft the CBD Guidelines on Biodiversity and Tourism Development (CBD Tourism Guidelines).¹⁹⁷ The purpose of these guidelines is to apply the provisions of the CBD to the sustainable development and management of tourism activities.

The CBD Tourism Guidelines identify a multi-stakeholder management procedure, from which ten steps for the management of sustainable tourism and biodiversity are outlined, ranging from obtaining baseline information and identifying goals, to ensuring impact assessment and management, to implementation, monitoring and adaptive management.¹⁹⁸ The focus of these Guidelines – coordinated policy-making, development planning and management – is reflected by the requirement for national strategies and implementation by government bodies. Whilst the legal nature of the Guidelines is clearly non-binding, the context of their approval (at the meeting of the Conference of Parties to a widely ratified treaty of global scope) and the simultaneous proposal for a user's manual, glossary, and clearing-house mechanism in order to promote, collect and disseminate information, clearly demonstrates that these Guidelines are intended for practical application by the CBD state parties. Thus, the CBD represents an international treaty with significant implications for the tourism industry. State parties to the Convention have recognised the significant impact

¹⁹⁶ *Ibid.*, paragraphs 73-84.

¹⁹⁷ The Guidelines are available on the CBD webpage <<http://www.biodiv.org/programmes/socio-eco/tourism/guidelines.asp>>. The Guidelines were adopted at the seventh meeting of the Conference of the Parties in 2004 (Decision VII/14).

tourism has on the various forms of biodiversity and, consequently, the international treaty can be seen to operate on two levels. First, the rights and obligations set out in the CBD for the most part can be transferred directly to tourism activities, the majority of which are undertaken in an environment with highly variable biodiversity. Secondly, the institutional framework created by the Convention allows for the further exploration and development of associated issues (in this case, tourism), thereby harnessing the collective will of participating states. The CBD is one of the most widely ratified international environmental agreements, meaning that its institutional bodies have a significant role in the dissemination of information to participating states, in addition to the development and implementation of associated guidelines and programmes.

(b) Regional Scope

Some biodiversity problems have also been addressed at the regional level.¹⁹⁹ The conservation of 'wild fauna and flora and their natural habitats' is the stated aim of the 1979 Berne Convention on the

¹⁹⁸ See the Guidelines at the CBD webpage <<http://www.biodiv.org/programmes/socio-eco/tourism/guidelines.asp>>.

¹⁹⁹ The 1979 Berne Convention on the Conservation of European Wildlife and Natural Habitats (United Kingdom Treaty Series 56) is the most comprehensive regional attempt at conserving biodiversity and thus, will be examined here. However, also see e.g. 1940 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (161 UNTS 193); 1968 African Convention on the Conservation of Nature and Natural Resources (1001 UNTS 4); 1976 Convention on Conservation of Nature in the South Pacific (*International Environmental Legal Materials and Treaties* 976:45); 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources (15 *Environmental Policy and Law* 64); and the 1985 Nairobi Convention for the Protection, Management and Development of the Marine and Coastal Environment of the East African Region (*International Environmental Legal Materials and Treaties* 985:46), along with the 1985 Protocol Concerning Protection Areas and Wild Fauna and Flora in the Eastern African Region (*International Environmental Legal Materials and Treaties* 985:47).

Conservation of European Wildlife and Natural Habitats.²⁰⁰ In order to achieve this objective, the Convention provides specific conservation measures for both habitats and species. States must ensure the conservation of the *habitats* of wild flora and fauna species (especially those listed in Appendices I and II²⁰¹), having regard to conservation requirements in their planning and development, so as to avoid or minimise any deterioration of such areas.²⁰² The conservation of *species* under the Berne Convention is regulated by requiring the special protection of wild flora and fauna species listed in the Appendices.²⁰³ Whilst the title of the Convention implies that its scope is restricted to Europe,²⁰⁴ the Convention in fact extends to European species of fauna and flora, which includes those found outside Europe.²⁰⁵ In particular, countries in North Africa play an important role in the conservation of such species along their migration routes.²⁰⁶

The conservation of marine turtles offers a classic example of a situation where efforts to preserve both the species, and their habitat, have been undertaken by the Berne Convention. Tourism has a dual relationship with marine turtles. On the one hand, turtles create an attraction for tourists which can be observed either in the water, or when they come ashore to

²⁰⁰ Berne Convention, article 1. For an overview of the Convention see e.g. S.Jen 'The Convention on the Conservation of European Wildlife and natural Habitats (Bern, 1979): Procedures of Application in Practice' 2(2) *Journal of International Wildlife Law and Policy* (1999) 239; P.Sand (ed.) *The Effectiveness of International Environmental Agreements: A Survey of Existing Legal Instruments* (London: Grotius, 1992) 98; Lyster, note 181, ch. 8.

²⁰¹ Appendix I includes strictly prohibited flora species and Appendix II lists strictly protected fauna species.

²⁰² Berne Convention, article 4.

²⁰³ Berne Convention, articles 5, 6 and 7, and appendix I, II and III.

²⁰⁴ The Convention was established under the auspices of the Council of Europe. See the website <<http://www.nature.coe.int/english/cadres/bern.htm>>.

²⁰⁵ There are currently 45 parties to the Convention. See the website <<http://www.nature.coe.int/english/cadres/bern.htm>>.

nest. However, on the other, tourism coastal development poses a significant threat to the conservation of turtle's habitat, and marine turtles are still used for eggs, meat, shell, oil, and leather products, some of which finds its way into the tourism market.²⁰⁷ It is interesting to note, however, that the global economic value of marine turtles has recently been assessed, with non-consumptive uses (primarily tourism activities) generating considerable more revenue than consumptive marine turtle use.²⁰⁸

The Berne Convention lists the loggerhead turtle as a strictly protected species of fauna,²⁰⁹ thereby subjecting it to the protectionist measures set out in the text of the Convention.²¹⁰ Notably, Greece has recently been found to be in breach of its obligations²¹¹ to implement an effective system of strict protection for sea turtles on Zakynthos, so as to avoid any disturbance of the species during its breeding period and any activity which might bring about deterioration or destruction of its breeding sites.²¹² Many of these breaches relate to the on-going tourism activities which pose a threat to the preservation of the turtles and their habitat.²¹³ Consequently, the Berne Convention offers a valuable regional mechanism for addressing the tourism industry and its impact on both species and habitats.

²⁰⁶ In addition to the Council of Europe states, the Berne Convention has also been ratified by Belarus, Burkina Faso, Monaco, Morocco, Senegal, and Tunisia.

²⁰⁷ For a discussion on the different uses of marine turtles see S.Troëng and C.Drews *Money Talks: Economic Aspects of Marine Turtle Use and Conservation* (Gland: WWF International, 2004).

²⁰⁸ The average gross revenue from consumptive use of marine turtles is estimated at US \$581,815 per year, whilst non-consumptive use, such as tourism, generates an estimate US \$1,659,250: Troëng and Drews, note 207, p. 16-22.

²⁰⁹ The *Caretta caretta* is listed on Appendix II of the Berne Convention.

²¹⁰ In particular, Berne Convention, articles 4 to 6.

²¹¹ The provisions of the Berne Convention is implemented into EC law by Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora (OJ 1992 L 206, p.7).

²¹² *Case C-103/00 Commission of the European Communities v Hellenic Republic*, European Court Justice (30 January 2002).

3.2.2 Species Protection

The protection of species under international environmental law is now a well established component of biodiversity conservation. Incorporating terrestrial species, birds, migratory species, reptiles, amphibians, and marine living resources, international species protection constitutes an important aspect of sustaining the greater biodiversity element of the global environment. Tourists have been attracted to exotic and rare species for decades, with many countries in Africa providing testimony to the demand for wildlife viewing. However, increased attention from the tourism industry carries with it a danger that the species will be consumed or affected in such a way as to make both the species and the tourism activity unsustainable. Accordingly, the discussion below examines the way in which international environmental law regulates and manages various species in an attempt to offer protection against a continuously expanding tourism industry.

(a) International Trade in Species

In promoting the protection of certain species against over-exploitation through international trade, the Convention on International Trade in Endangered Species (CITES)²¹⁴ recognises, *inter alia*, the *recreational*

²¹³ *Case C-103/00 Commission of the European Communities v Hellenic Republic*, *European Court Justice* (30 January 2002) paragraph 8.

²¹⁴ For a discussion on the development and operation of CITES see e.g.: R.Hepworth 'The Independent Review of CITES' 1 *JWLP* (1998) 412; P.Sand 'Whither CITES: The Evolution of a Treaty Regime in the Borderland of Trade and Environment' 8 *EJIL* (1997) 29; W.Wijnstekers *The Evolution of CITES* (Geneva: CITES Secretariat, 2003 7th edition); Lyster, note 181, ch. 12.

value of wild fauna and flora.²¹⁵ CITES operates by assigning different species to one of the three Appendices to the Convention, each of which is afforded a different level of protection. Species listed in Appendix I include those 'threatened with extinction which are or may be affected by trade'.²¹⁶ Commercial trade in specimens of these species is prohibited.²¹⁷ However, even where alternative forms of trade are permitted (e.g. for scientific or educational purposes), they are subject to 'particularly strict regulation' in order not to further endanger their survival.²¹⁸ Appendix II includes those species which, although not necessarily now threatened with extinction, may become so unless strict regulation is imposed.²¹⁹ Trade is allowed in respect of Appendix II species only where the 'export will not be detrimental to the survival of that species' and the 'specimen was not obtained in contravention of the relevant law'.²²⁰ Species listed in Appendix III are those identified as being subject to national regulation in order to prevent or restrict exploitation, and requiring international cooperation to control trade.²²¹ Trade in these species is allowable in accordance with a (less stringent) permitting system, although for many species, an Appendix III inscription is a temporary measure until upgraded to an Appendix II classification.

The tourism industry is closely linked with issues surrounding international wildlife trade. Revenue from wildlife-related tourism continues to increase

²¹⁵ CITES, preamble.

²¹⁶ CITES, article II(1) and appendix I. The website of the CITES Secretariat details the species listed in each appendix <<http://www.cites.org/eng/append/appendices.shtml>>.

²¹⁷ 'Specimen' and 'species' are defined in Article I of the Convention.

²¹⁸ CITES, article II(1).

²¹⁹ CITES, article II(2) and appendix II.

²²⁰ CITES, article IV(2)(a) and (b).

²²¹ CITES, article II(3).

as tourists seek out the wilderness and unspoilt environment as part of their tourism experience. Whilst tourism potentially offers many benefits for the preservation of wildlife by way of public education and conservation-orientated revenue generation, it can also be seen to threaten protectionist measures established in CITES. As a result, the relationship between tourism and wildlife trade is inextricably linked. This was illustrated in 2000 when Kenya opposed the joint proposal of Botswana, Namibia, South Africa and Zimbabwe to lift the CITES ban on ivory trade. Whilst population numbers of elephant had recovered in some southern Africa countries, Kenya claimed that re-opening ivory trade would result in increased poaching and thereby threaten its tourism industry.²²² Something of a compromise was achieved in 2002 where Botswana, Namibia and South Africa were allowed to sell a limited and strictly controlled amount of their registered ivory, although Kenya and India remain opposed to ivory being available for sale.²²³ The link recognised between ivory trade and tourism is vital for countries such as Kenya where tourism ranks first in terms of foreign currency earnings.

Trophy hunting remains a draw card for many tourists visiting parts of Africa.²²⁴ Hunting safaris generally operate by charging a daily hunting rate, then an additional 'trophy fee' for different species, including amongst

²²² See S. Robinson 'Dying for Ivory' 155(15) *Time Europe* (17 April, 2000); Earth Negotiations Bulletin vol. 21(11) *Summary of the Eleventh Conference of the Parties to CITES* (2000) available on the IISD website <<http://www.iisd.ca/vol21/enb2111e.html>>.

²²³ CITES Resolution 10.10 (rev. COP12) Trade in Elephant Specimens.

²²⁴ Similarly, tourism operation exist in Norway for seal hunting, see 'Going Anywhere Nice this Year?' *BBC News*, 8 October 2004 at <<http://news.bbc.co.uk/1/hi/magazine/3713360.stm>>.

many others, buffalo, rhino, elephant, lion, leopard and giraffe.²²⁵ A number of exceptions to the regulation of trade are included under CITES, including 'specimens that are personal or household effects'.²²⁶ However, tourist souvenirs obtained outside the owner's state of usual residence are not included in this exception and, therefore, must comply with the permitting requirements.²²⁷ Under the provisions of CITES, trade in hunting trophies of Appendix I species is only permitted where accompanied by import and export permits, confirming that the 'exportation of the hunting trophy is not detrimental to the survival of the species'.²²⁸ Accordingly, any hunting trophy obtained in, for example, South Africa which is intended to be transported back to the tourist's home country, must be accompanied by the relevant CITES permits. Moreover, in the case of some species, quotas have been set by the CITES Conference of the Parties (COP) for the number of hunting trophies allowed for each particular country.²²⁹ CITES has also directly addressed the control of trade in tourist

²²⁵ See for example the 'Big Five African Safaris' company which quote trophy fees for each individual species in US dollars on the website <<http://www.bigfive-safaris.co.za/home.html>>.

²²⁶ CITES, article VII(3) and Resolution 12.9 on personal and household effects. This Resolution allows for the export/import without permit of: caviar (up to 250 grams per person); rainsticks (up to three per person); specimens of crocodile species (up to four per person); and queen couch shells (up to three per person).

²²⁷ CITES article VII(3) and Resolution 10.6 on Control of Trade in Tourist Souvenir Specimens. This applies to specimens of Appendix I species that are souvenirs being imported by a person returning to his State of usual residence, and specimens of Appendix II species that are souvenirs being imported by a person returning to his State of usual residence if the specimens were taken from the wild in a State requiring the prior grant of export permits before the export of such specimens.

²²⁸ CITES article VII(3) and Resolution 2.11 (Rev.) on Trade in Hunting Trophies of Species listed in Appendix I.

²²⁹ A detailed listed of export quotas is available on the CITES webpage <<http://www.cites.org/eng/resources/quotas/index.shtml>>. Special quota systems have been developed for trade in leopard hunting trophies and skins for personal use; trade in live specimens of cheetah and hunting trophies; markhor hunting trophies; and trade in ivory from African elephants. See W. Wijnstekers *The Evolution of CITES* (Geneva: CITES Secretariat, 2003 7th edition) ch. 27.

souvenir specimens by way of a COP resolution.²³⁰ The Resolution recognises that derivatives of Appendix I and II species continue to be widely sold as tourist souvenir specimens, including at international airports and duty free areas which cater largely for international travellers and, furthermore, that export permits are frequently not required by exporting countries. Accordingly, the Resolution urges states to comply with the trade regulations set out in CITES and prohibit the sale of Appendix I tourist souvenir specimens in areas beyond Customs control points, such as duty-free shops, seaports, and international departure areas. Finally, the importance of public education and the provision of accessible information in places of international departure is recognised and recommended as a method of informing travellers about CITES and their legal responsibilities relating to the export and import of wildlife specimens. Evidently, tourism activities involving the hunting or purchase of wildlife specimens can be seen to be guided and regulated by the CITES treaty.

(b) *Marine Mammals*

The conservation of cetaceans has traditionally centred on the regulation of the global whaling industry, with whales being exploited as a natural resource since the early thirteenth century.²³¹ It is only in more recent years that the link between marine mammals and tourism has become evident with the development and expansion of the international whale-watching industry. Extending to all marine mammals, the term 'whale-watching' has

²³⁰ Resolution 10.6 on the control of trade in tourist souvenir specimens (recalling Resolution Conf. 4.12 (Rev.)), adopted at the 10th COP in Harare, June 1997. For a discussion on this resolution see Wijnstekers, note 229, p. 143-150.

been described by the International Whaling Commission (IWC) as 'any commercial enterprise which provides for the public to see cetaceans in their natural habitat'.²³²

Whale-watching, as a commercial tourism activity, is now estimated to be a US \$1billion industry, with more than nine million participants per year in 87 countries and territories.²³³ There are more than 80 species of cetaceans included in whale-watching operations,²³⁴ and although the activity can take place from land-based or aerial platforms, it is boat-based tourism that is the most common, with 72% of tourists choosing to view whales in this way.²³⁵ There have been numerous studies undertaken on the potential effects of whale-watching on cetaceans, with results indicating that – as with any wildlife viewing activities – unregulated industries threaten normal cetacean behavioural patterns by intrusive human interaction.²³⁶ With a rapid growth in the number of whale watchers worldwide,²³⁷ this industry is clearly one

²³¹ For a historical description of whales as a natural resource and later, an object of conservation, see e.g. A.D'Amato and S.Chopra 'Whales: Their Emerging Right to Life' 85 *AJIL* (1991) 21.

²³² *IWC Chairman's Report of the 45th Annual Meeting, Appendix 9, IWC Resolution on Whale-watching* (1994) Report of the IWC, 44 at 33-4. A more descriptive definition stated whale-watching constitutes 'tours by boat, air or from land, formal or informal, with at least some commercial aspect, to see, swim with, and/or listen to any of the some 83 species of whales, dolphins and porpoises': E.Hoyt *Whale Watching 2001: Worldwide Tourism Numbers, Expenditures, and Expanding Socioeconomic Benefits* (Yarmouth Port: International Fund for Animal Welfare, 2001) 3.

²³³ Hoyt, note 232, p. 146.

²³⁴ The most common species for whale-watching are humpback whales, gray whales, northern and southern right whales, blue whales, minke whales, sperm whales, short-finned pilot whales, orcas, and bottlenose dolphins: Hoyt, note 232, p. 146-7. The blue and the northern right whale are classified as endangered species, whilst the humpback and southern right whale are considered vulnerable: IUCN Red List of Threatened Species.

²³⁵ Hoyt, note 232, p. 147.

²³⁶ E.g. R.Williams, A.Trites and D.Bain 'Behavioural Responses of Killer Whales (*Orcinus orca*) to Whale-watching Boats: Opportunistic Observations and Experimental Approaches' 256(2) *Journal of Zoology* (2002) 255.

²³⁷ During the 1990s there was an average annual increase of more than 10%: Hoyt, note 232, p. 12.

that deserves the attention of the international community in order to ensure that tourism is undertaken in an environmentally sustainable manner.

One of the fastest growing whale-watching industries is located in Iceland.²³⁸ Tourism currently represents one of the main economic industries for Iceland and as such, the increasing number of whale-watching activities makes an important contribution to the country's economy. However, debate now surrounds the future of the whale-watching industry in light of Iceland's decision to resume whaling 'under scientific permit', after a 14 year absence following the worldwide moratorium on whaling which came into effect in 1989.²³⁹ Participants within the tourism industry fear tourists may boycott the island in protest at its resumption of whaling (albeit under the guise of scientific research), thereby crippling the lucrative whale-watching business.²⁴⁰ Indeed, this supposition has proven to be something of a reality as Iceland has reduced its intended whaling quota in order to promote whales as a tourist attraction instead.²⁴¹ Moreover, estimates attribute the direct value of whale-watching in Iceland at \$8 million per year, whilst whaling yielded only \$3-4 million per year before the moratorium took effect in 1989.²⁴² Thus, not only does the tourism industry need to ensure its own activities are environmentally sustainable,

²³⁸ Iceland experienced an extraordinary annual growth rate of 250% from the mid to late 1990s. See Hoyt, note 232, p. 70-72.

²³⁹ Paragraph 10(e), Schedule to the Whaling Convention. See IWC Resolution 2003-2 which permits Iceland to kill 250 whales (100 minke, 100 fin and 50 sei whales) a year for two years in a Special Permit whaling operation.

²⁴⁰ A. Doyle 'Tourism Worries for Iceland over Whaling', at <<http://www.planetark.com/avantgo/dailynewsstory.cfm?newsid=22670>> (28 October 2003); A. Kirby 'Iceland Tourism Chief Warn Whalers' BBC News at <<http://news.bbc.co.uk/1/hi/sci/tech/2917267.stm>> (7 April 2003).

²⁴¹ Iceland indicated that it would instead take only 25 Minke whales, and no Sei or Fin whales: Reuters 'Iceland to catch Fewer Whales' Environmental News Network at <http://www.enn.com/news/2004-06-02/s_24435.asp> (2 June 2004).

but the impact of Iceland's whaling activities must also be considered, in order to determine what contributory effect they may have.²⁴³

Whales have been the topic of international conservation efforts since the 1930s,²⁴⁴ although early attempts were largely superseded by the 1946 International Convention for the Regulation of Whaling.²⁴⁵ The objective of the Convention is to 'provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry'.²⁴⁶ Accordingly, it is the sustainability of the whaling industry – as opposed to the conservation of the species for any intrinsic value – that was the original priority of this convention.²⁴⁷ Following conservation techniques including adoption of the 'blue whale unit', a species quota system, and the 'new management procedure',²⁴⁸ the International Whaling Commission (IWC) introduced a moratorium on commercial whaling to have effect from the 1986 season.²⁴⁹ Despite initial plans for the moratorium to be effective only until 1990, it still remains in force today.²⁵⁰ The provisions of the Whaling

²⁴² S. Hagalin 'In Iceland Whales May be Worth More Alive Than Dead', at <<http://www.planetark.com/avantgo/dailynewsstory.cfm?newsid=16625>> (28 June 2002).

²⁴³ For a discussion on the relationship between whaling and whale-watching see e.g. E.Hoyt and G.Hvenegaard 'A Review of Whale-watching and Whaling with Applications for the Caribbean' 30 *Coastal Management* (2002) 381.

²⁴⁴ The first whaling treaty was the 1931 Convention for the Regulation of Whaling.

²⁴⁵ For a discussion on the IWC, see e.g. Rose and Crane 'The Evolution of International Whaling Law' in P.Sands (ed.) *Greening International Law* (London: Earthscan, 1993); P.Birnie 'International Legal Issues in the Protection of the Whale: A Review of Four Decades of Experience' 29 *Natural Resources Journal* (1989) 903; Lyster, note 181, ch. 2; P.Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-watching* (New York: Oceana, 1985).

²⁴⁶ Whaling Convention, preamble.

²⁴⁷ For a discussion on the different types of value accorded to species protection see e.g. M.Bowman 'The Nature, Development and Philosophical Foundations of the Biodiversity Concept' in M.Bowman and C.Redgwell (eds.) *International Law and the Conservation of Biological Diversity* (London: Kluwer, 1995).

²⁴⁸ For a discussion of these conservation techniques see Lyster, note 181, p. 25-26.

²⁴⁹ Whaling Convention, schedule, paragraph 10(e).

²⁵⁰ Although there is a global moratorium on commercial whaling, some catch limits have been agreed by the IWC in respect of aboriginal subsistence whaling and scientific research. Furthermore, in 2004 Norway and Iceland were whaling under objection of the

Convention are enforced by a variety of methods including, inspectors,²⁵¹ national enforcement measures,²⁵² an international observer scheme,²⁵³ and sanctions.²⁵⁴

Much debate surrounds the conflicting ideologies regarding the initial purpose of the whaling convention to sustain the whaling industry, and the modern preservationist approach currently advocated by much of the international community.²⁵⁵ Accordingly, pressure has been exerted on the IWC by both pro- and anti-whaling states in respect of its mandate to establish conservation-based policy.²⁵⁶ Whilst the text of the Convention is restricted to the subject of conserving whale stocks, the IWC has facilitated considerable scientific research and provides guidance to states in respect of

convention, and Japan continues to take large numbers of minke whales by exploiting the 'scientific research' exception.

²⁵¹ Whaling Convention, schedule, paragraph 21.

²⁵² Whaling Convention, article 9(1). Note, New Zealand prohibits its nationals from taking any marine mammals, including any outside New Zealand's coastal jurisdiction: Marine Mammals Protection Act 1978, section 4.

²⁵³ The observer scheme is implemented by bilateral or trilateral agreements between the relevant states.

²⁵⁴ The United States government can take economic sanctions against any state whose activities diminish the effectiveness of the IWC, under the 'Pelly Amendment' and the 'Packwood-Magnuson Amendment'. For further detail see e.g. *Japan Whaling Association v American Cetacean Society*, Supreme Court of the US (30 June 1986) 25 *ILM* 1587; G.Martin and J.Brennan 'Enforcing the International Convention for the Regulation of Whaling: The Pelly and Packwood-Magnuson Amendments' 17 *Denver Journal of International Law and Policy* (1989) 293; Lyster, note 181, p. 34-35.

²⁵⁵ E.g. N. Schoon 'Britain says Whaling is Immoral' *Independent* 9 May 1996. Note the IWC Resolution 2003-1 (adopted in 2003) on Strengthening the Conservation Agenda of the International Whaling Commission.

²⁵⁶ E.g. W.Burns 'The Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission: Toward a New Era for Cetaceans?' 6(3) *Journal International Wildlife Law and Policy* (2003) 255; A.Ruffle 'Resurrecting the International Whaling Commission: Suggestions to Strengthen the Conservation Effort' 27 *Brooklyn Journal of International Law* (2002) 639; S.Suhre 'Misguided Morality: The Repercussions of the International Whaling Commission's Shift From a Policy of Regulation to one of Preservation' 12 *Georgetown IELR* (1999) 305; W.Burns 'The International Whaling Commission and the Future of Cetaceans: Problems and Prospects' 8 *Colorado Journal of International Environmental Law and Policy* (1997) 31; J.Berger-Eforo 'Sanctuary for the Whales: Will the be the Demise of the International Whaling Commission or a Viable Strategy for the Twenty-first Century?' 8 *Pace International Law Review* (1996) 439.

whale killing methods and associated welfare issues,²⁵⁷ small cetaceans,²⁵⁸ whale sanctuaries,²⁵⁹ conservation issues,²⁶⁰ and whale-watching activities.

A relatively new development in the work of the IWC is its involvement in whale-watching as a sustainable use of cetacean resources. The IWC established a working group on whale-watching and called upon state parties to undertake a preliminary assessment of whale-watching activities in their respective countries.²⁶¹ In acknowledging that the 'regulation of whale-watching is a matter for the responsible coastal state, rather than for the Commission',²⁶² the working group (under advice from the Scientific Committee) concluded the 'General Principles for Whale-watching' which were subsequently adopted by the Commission in 1996.²⁶³ The IWC Whale-watching Principles²⁶⁴ outline three aspects of the tourism activity to be accorded specific attention. First, states must manage the development of whale-watching to minimise the risk of adverse impacts. The Guidelines employ the idea of the precautionary principle in respect of evolving whale-watching operations²⁶⁵ and encourage states to implement measures to

²⁵⁷ A Workshop was conducted on Whale Killing Methods and Associated Welfare Issues alongside the 55th Annual Meeting in Berlin, 2003. The Report (IWC/55/Rep 5) is available on the IWC website at <[http://www.iwcoffice.org/2003%20Documents/Reports/55-Rep5\(WKM\).pdf](http://www.iwcoffice.org/2003%20Documents/Reports/55-Rep5(WKM).pdf)>.

²⁵⁸ The status of which under the Whaling Convention remains uncertain as the term 'whale' is not defined by the Convention.

²⁵⁹ Whaling Convention, schedule, paragraph 7.

²⁶⁰ The IWC passed Resolution 2003-1 to establish a Conservation Committee to strengthen the conservation agenda of the IWC.

²⁶¹ IWC Resolution 1993-9, adopted in 1993 at the 45th Annual Meeting.

²⁶² IWC Resolution 1994-14, adopted in 1994 at the 46th Annual Meeting.

²⁶³ IWC Resolution 1996-2, adopted in 1996 at the 48th Annual Meeting.

²⁶⁴ Scientific Committee's recommendations on the general principles for the management of whale-watching (IWC/48/4).

²⁶⁵ IWC Whale-watching Guidelines, principle 1(iii). Whilst the term is not specifically used in the Guidelines, IWC Resolution 1996-2 recognises the 'need for *precautionary measures* to ensure that the continuing development and expected expansion of whale-watching activities do not adversely affect cetacean populations, individual animals, or their environment, or significantly increase the risk to the survival or ecological functioning of such populations' (emphasis added).

regulate the variable elements of the activity.²⁶⁶ Secondly, platforms (the vessels from which tourists view whales) must be designed, maintained and operated in such a way as to minimise the risk of adverse effects on cetaceans. This point is especially important in respect of disturbances from noise, as cetaceans respond in different ways to 'low and high frequency sounds, relative sound intensity or rapid changes in sound'.²⁶⁷ Finally, tourist operators should allow cetaceans to control the nature and duration of interactions.²⁶⁸ This requires operators to be aware of aspects such as the speed and angle of approach, the distance between the platform and cetaceans, sudden changes in speed, direction or noise, and the placing of a platform between mother and calf pairs so as to separate a group. The IWC Whale-watching Guidelines provide a basis from which states have developed individual regulations and management procedures, building on and substantiating the standards set out by the Commission. Some 30 countries have implemented national whale-watching guidelines and regulations for tourist operators, building on the IWC Guidelines to varying degrees.²⁶⁹ Australia has adopted a particularly comprehensive set of guidelines for cetacean observation, outlining the operational requirements of vessels and aircraft (including how to approach cetaceans), the avoidance of noise, and rules regarding feeding, touching and swimming with cetaceans.²⁷⁰

²⁶⁶ Including platform numbers and the size, activity, frequency, and length of exposure in encounters with individual and groups of whales: IWC Whale-watching Guidelines, principle 1(i).

²⁶⁷ IWC Whale-watching Guidelines, principle 2. For a discussion on this point, see K.Scott 'International Regulation of Undersea Noise' 53 *ICLQ* (2004) 287.

²⁶⁸ IWC Whale-watching Guidelines, principle 3.

²⁶⁹ 'A Review of Whale Watch Guidelines and Regulations Around the World' is available on the IWC website < <http://www.iwcoffice.org/Catches.htm#Whalewatching>>.

²⁷⁰ 'National Guidelines for Cetacean Observation and Areas of Special Interest for Cetacean Observation' Environment Australia, 2000. Available on the website <<http://www.environment.gov.au>>.

International environmental law has offered an indirect, yet apparently extensive and successful solution to the problem posed by tourism in respect of marine mammals. Whilst the Whaling Convention offers very little by way of inherent conservation priorities, the infrastructure established around this international agreement (that is, the Commission, the Scientific Committee, and additional working groups), has harnessed the political will of member states and implemented international regulations in respect of whale-watching in response to the expanding tourism industry.

3.2.3 Habitat Preservation

Habitat preservation within international environmental law focuses on the protection and conservation of ecosystems and natural environments. The importance of these elements within global biodiversity is enormous, both independently as a natural resource, and also as the ecological setting which supports various species. Tourism has a substantial influence on the environment of natural habitats in both of these respects. Tourists are drawn to the environment where a natural habitat offers an attraction due to its inherent value, such as Antarctica, or where a habitat is deemed to be of outstanding interest and accordingly attributed world heritage status. Similarly, tourism has a measurable effect where the industry develops and consumes natural habitats, or degrades ecosystems as a result of pursuing species located within that environment. Discussion now turns to examine the manner in which international environmental law offers a structure to regulate or manage the preservation of habitats from tourism activities.

(a) Heritage Sites

Natural and cultural heritage sites enjoy considerable attention from the tourist industry, with the result that such sites require the regulation of international environmental law in order to ensure their conservation. An international treaty which addresses this subject area – and has significant implications for the tourism industry – is the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention).²⁷¹ The tenet underlying this international agreement is that the deterioration or disappearance of any item of cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world and accordingly, heritage of outstanding interest needs to be preserved as part of the *world heritage of mankind as a whole*.²⁷²

For the purpose of the Convention, the term 'natural heritage' is defined so as to include natural features (consisting of physical and biological formations), geological and physiographical formations, the habitat of threatened species of animals and plants, and natural sites or precisely delineated natural areas.²⁷³ It is the responsibility of each state party to the

²⁷¹ For an account of the World Heritage Convention (11 ILM 1358) see e.g.: Lyster, note 181, ch. 11; T.Atherton and T.Atherton 'The Power and the Glory: National Sovereignty and the World Heritage Convention' 69 *Australian Law Journal* (1995) 631; World Congress on National Parks and Protected Areas *World Heritage Twenty Years Later* (Gland: IUCN, 1992).

²⁷² WHC, preamble (emphasis added). Note the use of the different concepts of 'common concern' and 'common heritage' in international environmental law. For an explanation see e.g. A.Boyle 'International Law and the Protection of the Global Atmosphere: Concepts, Categories and Principles' in R.Churchill and D.Freestone (eds.) *International Law and Global Climate Change* (London: Graham & Trotman, 1991); C.Joyner 'Legal Implications of the Concept of the Common Heritage of Mankind' 35 *ICLQ* (1986) 190.

²⁷³ WHC, article 2. 'Cultural heritage' is defined in Article 1 of the Convention.

Convention²⁷⁴ to identify and delineate natural and cultural heritage situated on its territory, thereby creating a duty to ensure the identification, protection, conservation, presentation and transmission to future generations of that heritage.²⁷⁵ This is largely achieved by states undertaking specific measures to protect their heritage, including *inter alia* the adoption of general policies to integrate protective measures, the establishment of appropriate services, the development of scientific and technical research, and fostering the development of training.²⁷⁶ In Australia, notably, these measures have been considered by the courts to create a legal duty in respect of the listed heritage properties within its territory.²⁷⁷ The Convention emphasises that, whilst respecting issues of sovereignty and national property rights, state parties recognise that natural and cultural heritage constitutes a 'world heritage' for whose protection it is the duty of the international community as a whole to co-operate.²⁷⁸

Established under the auspices of the Convention, and responsible for a number of administrative roles, is the World Heritage Committee. Arguably the foremost responsibility of the Committee is the compilation of the World Heritage List – an inventory of national properties identified by states as forming a country's natural and cultural heritage and endorsed by the

²⁷⁴ There were 179 state parties to the Convention at 7 January 2005. For a list of state parties see the website <<http://whc.unesco.org/pg.cfm?cid=246>>.

²⁷⁵ WHC, articles 3 and 4.

²⁷⁶ WHC, article 5.

²⁷⁷ See the judgment of the High Court of Australia in *Commonwealth of Australia v State of Tasmania* (1983) 158 CLR 1 (the Tasmanian Dam case). For a discussion on the implementation of the World Heritage Convention in Australia see e.g. D. Farrier and L. Tucker 'Beyond a Walk in the Park: The Impact of International Nature Conservation Law on Private Land in Australia' 22 *Melbourne University Law Review* (1998) 564; Richardson 'A Study of Australian Practice Pursuant to the World Heritage Convention' 20(4/5) *Environmental Law and Policy* (1990) 143; B.M. Tsamenyi, 'Implementing International Environmental Law in Australia: *Queensland v The Commonwealth*' 2 *JEL* (1990) 108; Atherton and Atherton, note 271.

Committee as being of outstanding universal value.²⁷⁹ There are currently 788 properties inscribed on the World Heritage List, comprising 611 cultural, 154 natural, and 23 mixed properties.²⁸⁰ In addition, the Committee maintains a list of 'World Heritage in Danger' for which extra operations and assistance may be provided.²⁸¹ This list includes properties which appear on the World Heritage List but are threatened by serious and specific dangers, such as, for example, the 'threat of disappearance caused by accelerated deterioration, large-scale public or private projects or rapid urban or *tourist development projects*...'.²⁸² There are currently 35 properties on the List of World Heritage in Danger.²⁸³ Inscription of a site on either of the World Heritage Lists enables the host state to apply for financial assistance from the World Heritage Fund.²⁸⁴ International assistance from the Fund is available to facilitate preparation, technical cooperation, training, emergency measures, or assistance for educational, information and promotion activities.²⁸⁵

World heritage sites have always represented popular natural and cultural attractions for tourists.²⁸⁶ Accordingly, the World Heritage Convention

²⁷⁸ WHC, article 6.

²⁷⁹ WHC, article 11. Also note the 'Operational Guidelines for the Implementation of the World Heritage Convention' which provides additional details on the establishment of the World Heritage List (last revised June 2002 at the 26th Session of the World Heritage Committee).

²⁸⁰ The last sites to be inscribed to the World Heritage List were done so at the 29th session of the World Heritage Committee (July 2004). A full description of the listed sites is available on the World Heritage website <<http://whc.unesco.org/nwhc/pages/home/pages/homepage.htm>>.

²⁸¹ WHC, article 11(4).

²⁸² Article 11(4), WHC (emphasis added).

²⁸³ The List is current as of July 2004. It will be updated following the next meeting of the Committee in July 2005.

²⁸⁴ WHC, articles 15 to 18.

²⁸⁵ WHC, article 22. For details on the conditions and arrangement for international assistance see WHC, articles 19 to 26.

²⁸⁶ This discussion will focus on the *natural heritage* identified by the World Heritage Convention in keeping with the subject area of the thesis. The problems generated by

offers a mechanism for conserving and managing specific sites which may be susceptible to environmental degradation as a result of tourist activities.²⁸⁷ The duty to protect natural heritage under the Convention includes such obligations as the adoption of policies for conservation, the development of scientific and technical research on the dangers threatening the heritage site, taking appropriate legal, administrative and financial measures, and the fostering of training and scientific research in this field.²⁸⁸ By way of illustration, the Djoudj National Park in Senegal is classified as a natural heritage site²⁸⁹ and therefore the national authorities must observe the conservation and environmental management standards set down by the Convention. Djoudj is a sanctuary for over three million African birds, meaning that tourism has proliferated in recent years with an increasing number of visitors flocking to the park to observe these migrating species.²⁹⁰ Similarly, the Komodo National Park in Indonesia is made up of a group of volcanic islands inhabited by more than 5,000 giant lizards which exist nowhere else in the world. The numbers of tourists visiting Komodo has increased rapidly over recent years (rising from 100 in 1980 to 15,000 in 1990)²⁹¹ and, as a result, the park now offers visitor centres, accommodation facilities and information centres for the benefit of tourists. Another

tourism in respect of cultural sites are equally important, but extend outside the ambit of this discussion.

²⁸⁷ The relationship between tourism and world heritage has been recognised by the World Heritage Committee which has met to discuss and establish a partnership programme to ensure both aspects operate to complement one another. For further information see e.g. The World Heritage Newsletter No.39 (2003) Tourism and World Heritage; No. 34 (2002) Eco-tourism and World Heritage; No.4 (1994) Reconciling Tourism and Natural Heritage; No.3 (1993) Tourism and Natural Sites.

²⁸⁸ WHC, article 5.

²⁸⁹ The Djoudj National Park was inscribed on the List of World Heritage in Danger in December 2000.

²⁹⁰ See the WCMC datasheet on the Djoudj National Park available on the World Heritage website <http://www.wcmc.org.uk/protected_areas/data/wh/djoudj.html>.

²⁹¹ See the WCMC datasheet on Komodo National Park at the World Heritage website <http://www.wcmc.org.uk/protected_areas/data/wh/komodo.html>.

example is the Fiordland National Park in New Zealand,²⁹² comprising fjords, rocky coasts, towering cliffs, lakes and waterfalls, with two-thirds of the park being covered with southern beech and podocarp forests, some of which are over 800 years old. Tourism has played a leading role within Fiordland for many years and, following the Park's World Heritage inscription in 1990, the heritage site is now subject to additional conservation criteria.

The Nanda Devi National Park in the Indian Himalayas offers a particularly interesting case study. Inscribed as a World Heritage site in 1988, the Park encompasses 63,033 hectares of mountain wilderness incorporating the 7,800 metre Nanda Devi peak and provides the natural habitat for several endangered mammals, including the snow leopard, Himalayan musk deer and bharal.²⁹³ However, unregulated tourism activities in the Nanda Devi region, primarily in the form of mountaineering expeditions, cumulated in serious damage to the ecosystem as a direct result from poaching wild animals and medicinal plants, tree felling, and garbage disposal. In response to the environmental threat posed in the region, Nanda Devi was designated a UNESCO Biosphere Reserve in 1988, with the result that mountaineering activities were prohibited in an attempt to promote conservation and regenerate the damaged ecosystem.²⁹⁴ Biosphere reserves are organised into three inter-related zones (the core, buffer, and transition

²⁹² Listed as Te Wahipounamu (South-West New Zealand World Heritage Area), incorporating the Westland and Mount Cook National Park and Fiordland National Park.

²⁹³ See the World Heritage website for a full description of the inscribed area <http://www.wcmc.org.uk/protected_areas/data/wh/nandadev.html>.

²⁹⁴ C.S.Silori 'Biosphere Reserve Management in Theory and Practice: Case of Nanda Devi Biosphere Reserve, Western Himalaya, India' 4(3) *Journal of International Wildlife Law and Policy* (2001) 205.

areas)²⁹⁵ combining conservation, development, and logistic (research, monitoring and education) functions.²⁹⁶ Following the prohibition of tourism activities in the Nanda Devi region, 'the overall status of flora and fauna exhibited remarkable improvements both in the core and buffer zones', demonstrating a highly successful conservation initiative.²⁹⁷ However, whilst the biodiversity of the Nanda Devi Biosphere Reserve prospered, the consequent socio-economic impact on local communities proved disastrous, with loss of employment (in part as a result of the prohibition on mountaineering), forcing many local people to migrate from the area.²⁹⁸ These results highlight the importance of adopting an integrated management approach toward tourism activities in order to guarantee the sustainability of all elements of the ecosystem.

These examples provide a typical indication of the many natural sites inscribed as world heritage which also operate as tourist destinations. The conservation standards and financial assistance mechanisms established by the World Heritage Convention – and similarly the Biosphere Reserve programme – operate as a means of preventing unsustainable tourism development which could otherwise lead to rapid environmental degradation of the area.

²⁹⁵ The 'core area' is strictly protected to prevent disturbance to ecosystems; some activities may be permitted in the 'buffer zone', such as education, research, and tourism; and the transition zone may operate as a protective buffer zone: Silori, note 294, p. 206.

²⁹⁶ See the website for UNESCO's Man and the Biosphere Programme
<http://www.unesco.org/mab/>.

²⁹⁷ Indicators for improvement included the number of mammal, bird, and plant species recorded, the proportion of trees cut, and the proportion of lopped trees. Silori, note 294, p. 211-212.

²⁹⁸ Silori, note 294, p. 211-214.

The relationship between tourism and world heritage has been recognised by the World Heritage Committee.²⁹⁹ A collaborative project was launched in Indonesia to link biodiversity, conservation and sustainable tourism at world heritage sites. This initiative aims to engage the enthusiasm and financial support of the tourism industry to promote the integration of development and sustainable tourism in respect of world heritage sites.³⁰⁰ Similarly, the relationship received further attention in 2003 when a special session on 'World Heritage and Tourism Partnership Programmes' was convened. The objective of this session was to encourage tour operators to engage in partnerships with world heritage natural sites to ensure there is an active exchange to maximise the positive aspects, and reduce the negative aspects, of tourism activities.³⁰¹ These subsidiary projects are fundamental in addressing the specific issues emanating from the World Heritage Convention and allow such issues to be discussed and implemented effectively by the relevant stakeholders.

Complementing the World Heritage Convention on a regional basis is the European Landscapes Convention, opened for signature in 2000.³⁰² Applying to all natural, urban and peri-urban areas, the scope of the Landscape Convention extends to 'landscapes that might be considered outstanding as well as everyday or degraded landscapes'.³⁰³ Unlike the World Heritage Convention, state parties are not required to designate sites

²⁹⁹ 'Reconciling Tourism and Natural Heritage' World Heritage Newsletter No. 4 (1994) 1.

³⁰⁰ 'Ecotourism and World Heritage' World Heritage Newsletter No. 34 (2002) 5.

³⁰¹ 'Tourism and World Heritage' World Heritage Newsletter No. 39 (2003) 2.

³⁰² The Convention entered into force on 1 March 2004. See M.Dejeant-Pons 'The European Landscape Convention Entered Into Force' 34(2) *Environmental Policy and Law* (2004) 79, and the Council of Europe website

<<http://www.nature.coe.int/english/main/landscape/conv.htm>>.

³⁰³ European Landscapes Convention, article 2.

of special value, but instead must introduce protection, management and planning rules for all landscape based on a set of conservation-orientated principles. Tourism is identified within the Convention as a development area contributing towards the acceleration of landscape transformation and thus, an activity which must be successfully managed in order for the objectives of the Convention to be achieved. As the Landscape Convention has only recently been adopted, it remains to be seen how state parties will proceed to implement and develop its provisions.

(b) Wetlands

The 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat (the Ramsar Convention), recognises the diverse value of the wetland environment and offers a conservation mechanism for such ecosystems.³⁰⁴ The Convention acknowledges the value of wetlands as a 'resource of great economic, cultural, scientific and *recreational value*,' thereby aiming to 'stem the progressive encroachment on and loss of wetlands now and in the future'.³⁰⁵ The term 'wetlands' is accorded a particularly wide definition, encompassing 'areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres'.³⁰⁶ State parties are required to designate wetlands for inclusion in the List of Wetlands of

³⁰⁴ Ramsar, Iran (2 February 1971), 11 *ILM* (1972) 963. See <<http://www.ramsar.org/>> for further details. For a discussion on the mechanics of the Ramsar Convention, and its developments, see respectively, M.Bowman 'The Ramsar Convention Comes of Age' *Netherlands International Law Review* (1995) 1-52 and, M.Bowman 'The Ramsar Convention on Wetlands: Has it Made a Difference?' *Yearbook of International Cooperation on Environment and Development* (2002/03) 61-68.

³⁰⁵ Ramsar Convention, preamble (emphasis added).

International Importance, based upon the area's international significance in terms of ecology, botany, zoology, limnology or hydrology.³⁰⁷ There are currently 1,368 sites designated under the Ramsar Convention, covering 119,611,621 hectares of wetland.³⁰⁸

The Convention includes few substantive legal obligations for participants, requiring primarily that state parties promote (i) the conservation of the wetlands included on the List, and (ii) as far as possible, the wise use of wetlands in their territory.³⁰⁹ Whilst the Convention distinguishes between 'wise use' (of wetlands generally) and 'conservation' (of designated sites), there has been a shift by the Ramsar system to recognise both conservation and wise (sustainable) use as the first step along a pathway "...the endpoint of which is achieving the long-term wise (sustainable) use of the site'. Accordingly, although different terms have been used in the Convention, it is intended that – in respect of Ramsar obligations – the principle of wise (or sustainable) utilisation is the ultimate end objective.³¹⁰ The 'wise use of wetlands' has been interpreted by the conference of the parties to the Ramsar Convention to mean the 'sustainable utilisation for the benefit of humankind in a way compatible with the maintenance of the natural properties of the ecosystem'.³¹¹ Moreover, sustainable utilisation was also

³⁰⁶ Ramsar Convention, article 1(1).

³⁰⁷ Ramsar Convention, article 2(1) and (2). More specific guidelines for the inclusion of wetlands on the List have been provided by the 7th COP, San Jose. See the Ramsar website <http://www.ramsar.org/key_criteria.htm>.

³⁰⁸ Latest data available February 2003. For details of the listed sites, see the Ramsar website <http://ramsar.org/key_sitelist.htm>.

³⁰⁹ Ramsar Convention, article 3(1).

³¹⁰ Ramsar Resolution VII.11 (Annex paragraph 23) adopted at COP 7 (1999).

³¹¹ The 3rd Meeting of the Conference of the Parties to the Ramsar Convention in Regina, Canada (27 May to 5 June 1987) adopted a set of 'guidelines for the implementation of the wise use concept'. The Guidelines were first adopted as an annex to Recommendation 4.10 of the 4th Meeting of the Conference of the Parties (Montreux, Switzerland, 1990). Furthermore, Additional Guidelines for the Implementation of the Wise Use Concept were

defined as the 'human use of a wetland so that it may yield the greatest continuous benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations.'³¹² These definitions fundamentally rely on anthropogenic uses of wetlands as a justification for conservation. It is noteworthy, however, that conservation in this respect means a sustainable form of utilisation, rather than a prohibitive "preservationist" approach. Accordingly, this human-orientated perspective is well suited to the tourism industry, where risk of environmental harm is founded entirely in anthropocentric activities.

Many of the sites listed as wetlands of international importance are also considered to be popular areas for nature-based tourism,³¹³ partly in response to the international status attributable to Ramsar sites.³¹⁴ Moreover, many countries have specific national wetland policies and strategic plans in which tourism is identified as an integral activity associated with wetlands and is therefore recognised as an important justification for conservation.³¹⁵ There are numerous examples of listed wetlands which have an important role for tourism, one example being Spain's Doñana National Park. Located on the southern coast of Spain,

adopted as an annex to Resolution 5.6 of the 5th Meeting of the Conference of the Parties (Kushiro, Japan, 1993). For details see the website
<http://www.ramsar.org/key_guidelines_index.htm>.

³¹² Annex to Recommendation 3.3 on the Wise Use of Wetlands, 3rd Meeting of the Conference of the Parties to the Ramsar Convention 1987.

³¹³ For example, the following sites have been listed as Ramsar sites: Everglades National Park, America; Loch Lomond, Scotland; Doñana National Park, Spain; and Lake Nakuru, Kenya.

³¹⁴ A complete list of Ramsar sites is available on the website
<http://ramsar.org/key_sitelist.htm>.

³¹⁵ For example see the 1986 New Zealand Wetlands Management Policy; 1997 Wetlands Policy of the Commonwealth Government of Australia; 1999 Greek National Strategy for Wetland Resources; and 1999 Ghana National Wetlands Conservation Strategy. For further details see the Ramsar Wise Use Resource Library website
<http://www.ramsar.org/wurc_library.htm>.

Doñana encompasses more than 50,000 hectares of sand dunes, ponds, lagoons, and marshy areas.³¹⁶ The wetland area hosts an extensive range of fauna and flora (including the critically endangered *lynx pardinus*),³¹⁷ and supports thousands of birds migrating between Africa and Europe. The environmental significance of Doñana National Park has been recognised by parties to the Ramsar Convention, where the region was listed as a wetland of international importance in 1982, and subsequently added to the Montreux Record in 1990 for 'sites where changes in ecological character have occurred, are occurring, or are likely to occur', and thereby require priority attention.³¹⁸

One of the main problems facing the Doñana ecosystem is the impact of mass tourism both in and around the park.³¹⁹ Tourism within the park boundaries is controlled with entrance allowed only to those accompanied by a local guide. The vast numbers of waterfowl, ducks, geese and other water birds, together with a variety of game, mean that tourist numbers continue to prosper. However, perhaps more problematic (and the subject of less stringent regulation) is the mass tourism development taking place on Doñana's periphery. The main concern with such development is the extensive water extraction required to develop and maintain a large tourism complex (often including a water-intensive golf course), which competes with the natural water resources and thereby, poses a significant risk to the

³¹⁶ Description of Doñana National Park as a Ramsar site is included on the website <http://www.ramsar.org/profiles_spain.htm>.

³¹⁷ The lynx has been listed as 'critically endangered' on the IUCN Red List of Threatened Species; included on CITES Appendix I; and is a protected species in Spain and Portugal.

³¹⁸ Recommendation 4.8 (4th COP) Montreux, 1990. In addition to national management plans, Doñana has also been recognised as a World Heritage site; UNESCO Biosphere Reserve; and special protection area under EC Directive 79/409/EEC.

ecological character of the park's ecosystem.³²⁰ The Ramsar Convention promotes the wise use of wetlands, thereby supporting the sustainable utilisation of Doñana's resources for tourism activities.³²¹ However, Spain, as a party to the Convention, must employ the sustainable utilisation principle in respect of managing and conserving the national park, in order to comply with its international obligations. Thus, it becomes obvious that the Ramsar Convention operates in a broadly similar way to the World Heritage Convention, by recognising natural sites (which are often popular tourism resources) and according a special level of protection to ensure the on-going sustainability of the international resource.

Finally, the Ramsar Secretariat, as the institutional body of the Convention, is participating in the recently established International Corporate Wetlands Restoration Partnership (ICWRP). Operating as a public-private venture, ICWRP is an umbrella initiative designed to facilitate the involvement of businesses, environmental organisations, and governments to participate in a global approach to restoring wetlands.³²² The first wetland to receive the attention of ICWRP is Sian Ka'an Biosphere Reserve, south of Cancun on Mexico's Yucatan peninsula, which has suffered significant environmental degradation as a result of coastal development, unregulated tourism and unsustainable fishing and farming practices. Listed as a World Heritage site and included on the Ramsar List, Sian Ka'an is to receive US \$750,000

³¹⁹ Other threats to Doñana include neighbouring agricultural projects whose run-off waters carry pesticides into the park, and environmental accidents from upstream sulphur mines.

³²⁰ 'Tourism Threatens Spanish Wildlife Sanctuary' 126(1711) *New Scientist* (7 April 1990).

³²¹ Note that in recent years the major problem facing Doñana's natural habitat has been pollution from local mining sites. See D. MacKenzie 'Doñana Damned: Pollution Could Threaten Spain's Natural Treasure for Decades' *New Scientist* (2 May 1998) 12.

³²² See the ICWRP website <<http://www.coastalamerica.gov/text/cwrpinternational.html>>.

from ICWRP to aid the restoration of its coastal dunes, lagoons, and mangrove swamps.³²³

(c) *Antarctic Eco-system*

The extent to which international environmental law regulates marine pollution within the Antarctic environment has been discussed above. This section now examines the manner in which the conservation of Antarctica as a natural habitat supporting numerous species and eco-systems has been addressed by the international community, keeping in mind its increasingly prominent role in the global tourism industry.

The highlight of any trip to Antarctica most likely involves time ashore, where passengers are able to physically 'stand on the Antarctic continent', photograph the wild flora and fauna, and explore the local environment.³²⁴ However, such landings also represent potentially high-risk activities for the Antarctic environment, as tourists threaten to damage vegetation, import disease, discard litter, or interfere with wildlife. All of these activities have the potential to impact negatively on the Antarctic eco-system and local habitats, thereby threatening the sustainability of flora and fauna. This is especially relevant for popular landing sites – such as many of those on the Antarctic peninsula – which may receive tourists every second or third day

³²³ 'New International Wetland Restoration Program to Start in Yucatan' (23 March 2004), at *Environmental News Network* <http://www.enn.com/news/2004-03-23/s_14246.asp>.

³²⁴ Many Antarctic tour operators follow the 'Linblad' pattern of tourist management when making landings. Usually no more than 100 passengers are allowed ashore at once where they are 'usually free to wander from their parties, but required to keep off glaciers, avoid climbing and other hazardous pursuits, and stay within easy reach of the embarkation point'. For a more detailed discussion of this point, see B.Stonehouse 'Ecotourism in Antarctica' in Cater and Lowman (eds.) *Ecotourism: A Sustainable Option?* (Chichester: Wiley, 1994) at 202-204.

throughout the summer by successive cruise ships.³²⁵ For example, Whalers Bay on Deception Island received 95 landings over the 2002-03 season³²⁶ with around 9,000 tourists coming ashore.³²⁷

Activities in Antarctica – including tourism – are subject to the regulations set out in the ATS.³²⁸ Of the five Annexes to the Antarctic Treaty's Environmental Protocol, two are of particular relevance regarding habitat preservation against tourism activities: Annex II on the Conservation of Flora and Fauna, and Annex V on Area Protection.³²⁹

Annex II effectively replaces the Agreed Measures for the Conservation of Antarctic Fauna and Flora concluded in 1964 by the Antarctic Treaty States.³³⁰ Notably, the Annex prohibits the taking of any native mammal or bird, except in accordance with a permit – and then – only where 'the diversity of species, as well as the habitats essential to their existence, and the balance of the ecological systems existing within the Antarctic Treaty

³²⁵ Stonehouse, *ibid.*, p. 202.

³²⁶ The Antarctic tourist season usually lasts for five months, from November to March.

³²⁷ See the IAATO website <<http://www.iaato.org/tourismstatistics/index.html>>.

³²⁸ There have been two Recommendations made at the ATCM regarding Antarctic tourism: Recommendation VIII-9 (1975), Norway, and Recommendation XVIII-1 (1994), Kyoto.

³²⁹ The 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) (19 ILM 841) also recognises the importance of safeguarding the environment and protecting the integrity of the ecosystem of the seas surrounding Antarctic. However, this Convention was concluded primarily in response to the conservation of krill, in recognising its vital role in the Antarctic food-chain and greater eco-system. Thus, it is of little relevance to the tourism industry. For an overview of the Convention, see e.g. N.Nasrullah 'The Convention on the Conservation of Antarctic Marine Living Resources: A Critical Review' 41(1) *Indian Journal of International Law* (2001) 111; Watts, note 86, p. 215-221; M.Howard 'The Convention on the Conservation of Antarctic Marine Living Resources: A Five Year Review' 38 *ICLQ* (1989) 104; and the website <<http://www.ccamlr.org>>.

³³⁰ For a discussion on the Agreed Measures, see e.g. Watts, note 86, p. 255-261; J.Myhre *The Antarctic Treaty System: Politics, Law and Diplomacy* (Boulder: Westview Press, 1986) ch.5.

are maintained.³³¹ The issuing of permits is largely restricted to scientific activities.³³² Annex II in fact goes further than the Agreed Measures by also prohibiting the removal or damage of native plants, where local distribution or abundance would be significantly affected.³³³ Again, however, such removal may be allowed in accordance with a permit. Thus, these provisions apparently prevent tourists taking home 'souvenirs' from Antarctica in the form of wild fauna and flora, although the qualification attached to the taking of native plants (the action must significantly affect the local distribution or abundance) creates a notable loophole.

Annex II also prohibits 'harmful interference' in respect of Antarctica's native flora and fauna.³³⁴ This provision aims to prevent the disturbance of concentrations of birds and seals by the use of helicopters or vehicles (including small vessels such as zodiac boats), or the wilful disturbance of breeding or moulting birds, or concentrations of birds and seals, by persons on foot.³³⁵ Furthermore, the significant damage to native plants by landing aircraft, driving vehicles, or walking on them is similarly prohibited.³³⁶ The Annex finally includes a catch-all provision prohibiting any activity that results in the significant adverse modification of habitats of any species or population of native mammal, bird, plant or invertebrate.³³⁷ Although these provisions are equally applicable to both scientific staff and tourists, the restrictions should establish a clear benchmark for the behaviour of tourists during Antarctic site visits. The Annex also acknowledges the risk of

³³¹ Environmental Protocol, article 3(1) and 3(3)(c), annex II.

³³² Environmental Protocol, article 3(2), annex II.

³³³ Environmental Protocol, article 3(1) and 1(g), annex II.

³³⁴ Environmental Protocol, article 3(1), annex II.

³³⁵ Environmental Protocol, article 1(h)(i),(ii), and (iv), annex II.

³³⁶ Environmental Protocol, article 1(h)(v), annex II.

introducing foreign diseases into such a delicately balanced natural habitat and accordingly, requires each state party to the Environmental Protocol to take precautions to prevent the introduction of micro-organisms (such as viruses, bacteria, parasites, yeasts, and fungi) which are not already present in the native fauna and flora.³³⁷ Informal procedures are in place to ensure tourists properly clean their boots before and after landing,³³⁸ whilst studies are being conducted into the effectiveness of using a disinfectant to prevent the transmission of pathogens.³³⁹

Annex V of the Environmental Protocol deals with area protection and management of sites in Antarctica. Consolidating earlier conservation attempts,³⁴⁰ the Annex allows for the designation of Antarctic Specially Protected Areas (ASPAs) or Antarctic Specially Managed Areas (ASMA), where activities can be prohibited, restricted or managed.³⁴¹ An ASPA can be designated to protect areas of 'outstanding environmental, scientific, historic, aesthetic or wilderness values', where entry is prohibited, except with a valid permit.³⁴² Applications for permits are usually made to the appropriate authority within the country of origin of the applicant.³⁴³ However, a permit is not required for entry to an ASMA, which may be

³³⁷ Environmental Protocol, article I(h)(vi), annex II.

³³⁸ Environmental Protocol, article 4(6), annex II.

³³⁹ Curry *et al* 'Could Tourists Transmit Infectious Agents in Antarctica?' (Washington: IAATO, 2001), available on the IAATO website <http://www.iaato.org/tourists_infect.doc>.

³⁴⁰ The results of these studies are still inconclusive. See e.g. C. Curry *et al* 'Infection Control in Antarctica: Could Tourist Boots Act as Vectors for Transmission of Infectious Agents?' Presented at the 13th IAATO General Meeting, Cambridge, UK, 1 July 2002.

³⁴¹ The 1964 Agreed Measures allowed for the designation of five different sites: specially protected areas; sites of special scientific interest; historic sites and monuments; specially reserved areas; and multiple-use planning areas. Sites designated under the Agreed Measures were integrated into the new classification system established by Annex V.

³⁴² Environmental Protocol, article 2, annex V.

designated to 'assist in the planning and co-ordination of activities, avoid possible conflicts, improve co-operation between parties or minimise environmental impacts'.³⁴⁵ The designation of either an ASPA or ASMA requires the submission of a management plan for the site, outlining *inter alia* why special protection is required and what management activities will be undertaken to protect the area.³⁴⁶ Management plans for ASPA may include specific conditions under which entry permits may be granted, whilst those for ASMA should outline a code of conduct for the area.³⁴⁷

One area in Antarctica to be designated an ASPA is Deception Island in the South Shetland Islands, off the Antarctic Peninsula.³⁴⁸ The relevant management plan outlines the five sites on the Island that constitute the specially protected area and recommends that tourists be excluded, and entry limited to research scientists.³⁴⁹ In terms of tourism, Deception Island, an active volcano in which ships must cruise through a narrow passage into its flooded caldera, is one of the most popular places to land tourists. Around 15,000 landings were made on the Island during the 2002-03 season, enabling tourists to explore a derelict Norwegian whaling station, remains of the British Operation Tabarin war base, the distinctive native

³⁴³ Environmental Protocol, article 3(1) and (4), annex V. In April 2004, there were 159 ASPA sites designated, see the Committee for Environmental Protection website <<http://www.cep.aq/apa/aspa/index.html>>.

³⁴⁴ Environmental Protocol, article 7, annex V.

³⁴⁵ Environmental Protocol, article 4, annex V.

³⁴⁶ Environmental Protocol, article 5(3), annex V.

³⁴⁷ Environmental Protocol, article 5(3)(i) and (j), annex V.

³⁴⁸ ASPA No.140 (formerly SSSI No.21). For further details see the Committee for Environmental Protection website <<http://www.cep.aq/apa/aspa/sites/aspa140/index.html>>.

³⁴⁹ Paragraph VI, Management Plan, ASPA No.140 (Deception Island). Available on the website <<http://www.cep.aq/apa/aspa/sites/aspa140/index.html>>.

fauna and flora, and enjoy a swim in the volcanic hot pools.³⁵⁰ The designation of sites on Deception Island, in accordance with the Environmental Protocol, thereby regulates the activities of Antarctic tourism by restricting the areas in which tourists may visit under the management plan. The only ASMA to be designated under the provision of Annex V is Admiralty Bay, in King George Island off the Antarctic Peninsula.³⁵¹ With over 2,000 landings made during the 2002-03 season,³⁵² the Bay was designated a ASMA in recognition of its outstanding environmental, scientific, scenic and historic value and in light of the number of national Antarctic programmes and tourist parties operating in close proximity to one another. The designation of Admiralty Bay as an ASMA will contribute to the protection of the environment from unnecessary disturbance by tour operators and attempt to ensure the outstanding biological, ecological, historical and aesthetic values of the area.³⁵³

The requirements set out in Annex II and V to the Environmental Protocol provide relatively detailed regulation and guidance in respect of ensuring that tourism activities do not degrade the natural habitat of the Antarctic environment. Coupled with the guidance for visitors provided by

³⁵⁰ Landings on Deception Island were made at Whalers Bay, Pendulum Cove, Baily Head, Telefon Bay, and Gabriel de Castilla Station. See the IAATO website < http://www.iaato.org/tour_stats.html>.

³⁵¹ For further details see the Committee for Environmental Protection website < <http://www.cep.aq/apa/asma/index.html>>.

³⁵² Landings made at Admiralty Bay, Arctowski Station (Poland), and Comandante Ferraz Station (Brazil). See the IAATO website < http://www.iaato.org/tour_stats.html>.

³⁵³ See the Committee for Environmental Protection website < <http://www.cep.aq/apa/asma/index.html>>.

IAATO,³⁵⁴ international environmental law provides a specifically tailored approach to tourist activities in the Antarctic environment.

3.3 Conclusion

The purpose of this chapter is to ascertain how international environmental law has addressed the tourism industry to date. Such an analysis helps determine whether international environmental law is in fact a suitable vehicle for attempting to reconcile tourism and environmental interests, the extent to which it is currently being employed, and the potential for future regulation. Given the vast (and continuously expanding) remit of international environmental law, the topic has been explored by way of identifying the two broad areas of environmental pollution and biodiversity. The choice of these topics is justified by the fact that pollution and biodiversity represent the two main areas of regulation within international environmental law.

Environmental pollution occurs primarily in the form of marine and atmospheric pollution.³⁵⁵ Tourism activities have long centred on the aquatic environment, be it lakes, rivers, waterways, the ocean, or the beach, with the result that the corresponding scope for environmental degradation is significant. Pollution from land-based sources is especially prevalent in respect of tourism due to the extensive infrastructure development

³⁵⁴ See Guidance for those Organising and Conducting Tourism and Non-governmental Activities in the Antarctic at <http://www.iaato.org/tourop_guide.html>, and Guidance for Visitors to the Antarctic at <http://www.iaato.org/visitor_guide.html>.

³⁵⁵ Environmental pollution does occur in respect of landmass, however due to the primarily national responsibility for this problem (as opposed to international

undertaken in coastal regions. Whilst there exist generic international provisions to regulate land-based marine pollution, some regimes have now specifically addressed tourism as a problematic area and specifically target these activities. As a result, land-based marine pollution has been largely addressed on a regional basis (under the aegis of an international framework), which consequently allows for the specific tourism activities and environmental conditions to be the focus of regulatory efforts – as demonstrated by the Regional Seas Programme and the OSPAR Convention.

Vessel-sourced marine pollution primarily targets the cruise ship industry, where the discharge of sewage has become increasingly problematic.³⁵⁶ MARPOL provides basic international regulations, which have recently been strengthened by new IMO regulations which will eventually see all cruise ships equipped with a sewage treatment plant or holding tank. MARPOL also addresses garbage disposal at sea and, furthermore, air pollution will similarly be regulated following the entry into force of the relevant Annex. These marine pollution issues are exasperated in the polar regions where the environment is much more sensitive to changing conditions.³⁵⁷ The Antarctic Treaty System has recognised the growing Antarctic tourism industry and responded with specific provisions, effectively transposing many of the international regulations established in

responsibility) and the prevalence of marine and atmospheric pollution, it has not been discussed in this chapter.

³⁵⁶ 'Conservationists liken them to mobile sewage farms, spewing millions of gallons of untreated and chemical-saturated waste into the sea as they journey to some of the planet's most remote places'. See M.Townsend 'Cruise Ships Must Clean up Their Act' *The Observer* (28 March 2004), available on the website <<http://www.guardian.co.uk/waste/story/0,12188,1179639,00.html>>.

MARPOL to the Antarctic environment. In addition, the IAATO has set standards and guidelines for Antarctic tour operators further endorsing these international regulations and specifically tailoring them for Antarctic cruise ships – also making the regulations more accessible for the relevant operators.

Tourism similarly contributes to atmospheric pollution as a result of infrastructure development and transportation – both of which generally require a high level of fossil fuel consumption. Whilst tourism activities contributing to climate change are, in general, caught by the provisions set out in the Climate Change Convention and the Kyoto Protocol, the relationship between tourism and climate change has been explored in greater detail by the international community at the Djerba International Conference on Climate Change and Tourism. Although recommendations made as a result of this conference are not sufficiently specific, they represent an early development in the recognition of tourism's contribution to international atmospheric pollution. Similarly, the contribution to climate change made by the civil aviation industry has been acknowledged and addressed in a preliminary manner by the international community, although in this case much relies on technological developments within the industry.

Tourism is also closely linked with many aspects of conservation. Whilst the Convention on Biological Diversity details conservation techniques to be generally applied to species and their habitat, the relationship between tourism and biodiversity has been specifically recognised by participants to

³⁵⁷ See e.g. A. Osborn 'Russia's Luxury Arctic Tours 'Risk Nuclear Disaster' *The*

the Convention, which resulted in the conclusion of the CBD Tourism Guidelines. Therefore, the Convention operates on two different levels – first as a general conservation mechanism establishing rights and obligations which are indirectly applicability to the tourism industry. Secondly, the CBD provides an institutional structure within which participants can address associated issues (such as tourism) which have an impact on biodiversity and, accordingly, harness the collective will of the participating states to reach agreement on the topic. This second way in which international environmental law facilitates the regulation and management of tourism activities is being employed increasingly frequently and offers an important method for existing legal agreements to expand and respond to the challenges posed by the international tourism industry.

International biodiversity instruments are increasingly adopting this dual focus which extends their applicability to tourism activities. There are numerous examples of international agreements which apply to tourism activities in a very general sense, but which have also used the institutional framework of the treaty to explore and develop tourism related issues in greater detail. Both CITES and the International Whaling Convention establish a basic conservation agreement, but in more recent years have acknowledged the influence of the tourism industry and thus, adopted guidelines, resolutions and recommendations under the auspices of the international agreement, to which participating states adhere. Similar developments are evident in respect of the preservation of habitats, such as wetlands and the Antarctic ecosystem. Whilst many of the tourism-specific

instruments are not legally binding, they provide an important way for contemporary issues to be recognised and discussed by the international community. It would clearly be unrealistic to expect the entire international community to unite and agree to a single set of regulations (with any substantive effect – and in any realistic timeframe) in respect of something so complex as the relationship between tourism and the environment.³⁵⁸ However, it is much more feasible for the international community to address tourism through pre-existing agreements and institutional arrangements, consequently adopting additional commitments in a supplementary and seemingly less onerous manner. Moreover, many of these non-binding, soft law commitments also operate as indicators of the future direction for international environmental law, hinting at issues that states consider to be of concern and paving the way for further legal development.

In this way, international environmental law has responded and addressed many of the tourism-related problems facing the environment, albeit in a somewhat ad hoc fashion. What remains to be seen however, is whether there is any over-arching substantive obligation in international law that requires participants to ensure that their activities do not have an unsustainable impact on the natural environment.

³⁵⁸ Consider how difficult it is to gain international agreement on issues such as climate change, where there are numerous competing interests (developed and developing states, small island states etc.), resulting in significant difficulties in obtaining substantive commitments from participating states.

4.

The Concept of Sustainable Tourism: A Legal Obligation in International Law?

The relationship between tourism and the natural environment has been extensively researched. The majority of conclusions indicate that, if undertaken in an unregulated context, tourism poses a significant threat to many aspects of the natural environment.¹ Tourism must be approached from an international perspective and has, indeed, been addressed by the international legal system in a number of ways. Many of the participants involved in the tourism industry play a role in the international legal process, albeit not always directly as subjects of international law.² Moreover, international institutions such as UNEP and the World Tourism Organisation have undertaken specific initiatives with a view to managing and regulating global tourism activities.³ International law has responded to the threat posed by tourism in various ways, notably in the context of environmental pollution (including marine and atmospheric pollution) and the conservation of biological diversity (regarding species protection and habitat preservation), where international environmental law can be applied

¹ See Chapter One for a discussion on the relationship between tourism and the environment, especially 1.2 and 1.3.

² Participants include states, individuals, multinational enterprises, NGOs, and international organisations. For a discussion on how these participants operate in the tourism industry, see Chapter Two (2.2).

³ E.g. UNEP tourism programme, WTO's initiatives on climate change, ecotourism, the Global Code of Ethics, and the International Network for the Sustainable Development of Coastal Destinations. See Chapter Two (2.3 and 2.4).

to tourism activities.⁴ Whilst there are many occurrences of tourism being recognised and addressed at the international level, what remains to be seen is whether there exists any specific legal obligation on tourism participants to ensure that their tourism activities do not degrade the natural environment.

The most commonly encountered way in which conservation principles are applied to the tourism industry is via the concept of 'sustainable tourism'.⁵ Although there are many different interpretations of what might constitute sustainable tourism, the definition concluded by the World Tourism Organisation is likely to represent the most widely endorsed.⁶ The WTO defines sustainable tourism as those activities which achieve a balance between environmental, economic and socio-cultural aspects of tourism development, in order to guarantee long-term sustainability.⁷ The WTO interpretation draws from the Brundtland Commission's sustainable development definition,⁸ which also focuses on a long-term sustainability approach (recognising the needs of both present and future generations)

⁴ See Chapter Three for an overview of the application of international environmental law to tourism.

⁵ The concept of ecotourism does promote environmentally sustainable tourism in some situations, however, its role as a niche market description renders it unsuitable for adoption as an environmental principle. See Chapter One (1.4).

⁶ For an expansion on this point, see Chapter One (1.3.2).

⁷ See the WTO website <<http://www.world-tourism.org/sustainable/top/concepts.html>>.

⁸ For a discussion on the principle of sustainable development in international law see e.g.: S.Dresner *The Principles of Sustainability* (London: Earthscan, 2002); A.Boyle and D.Freestone *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: OUP, 1999); U.Beyerlin 'The Concept of Sustainable Development' in R.Wolfrum (ed.) *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?* (Berlin: Springer, 1996); W.Lang *Sustainable Development and International Law* (London: Graham & Trotman, 1995); W.Silveria 'International Legal Instruments and Sustainable Development: Principles, Requirements, and Restructuring' 31 *Willamette Law Review* (1995) 239; and P.Sands 'International Law in the Field of Sustainable Development' 65 *British Year Book of International Law* (1994) 303.

and the reconciliation of competing interests.⁹ However, it seems that the general idea of sustainability established by the Brundtland Commission has been taken a step further with the WTO definition. Whilst ideas such as participation, preventive action, environmental impact assessment and cooperation are implicit in the basic concept of sustainable development, in its definition of sustainable tourism the WTO has specifically addressed many of these ideas and explained the way in which they relate to the tourism industry. Notably, the 'informed participation' of all relevant stakeholders is required in order to achieve sustainable tourism which, furthermore, requires 'constant monitoring of impacts' and where necessary, the introduction of preventive or corrective measures.¹⁰

The identification of the different components that contribute to the overall principle of sustainable tourism is helpful in leading to a more practical understanding of the principle in the broader context of public international law. As the definition of sustainable tourism is largely rooted in the principle of sustainable development, it follows that many of the concepts that contribute towards the Brundtland Commission's idea of sustainability will be similarly found in the principle of sustainable tourism. Each of these contributing concepts in fact represents an independent concept within international law, with the result that the principle of sustainable tourism becomes increasingly more accessible. Accordingly, drawing on

⁹ WCED *Our Common Future* (Oxford: OUP, 1987) 43. The Brundtland Commission defines sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.

¹⁰ See the WTO website <<http://www.world-tourism.org/sustainable/top/concepts.html>>.

the framework of sustainable development, a profile of the principle of sustainable tourism can be identified.

First, sustainable tourism is defined by certain *substantive characteristics* that shape and define the parameters of this concept. These substantive characteristics encompass four different components, namely intergenerational equity, intra-generational equity, sustainable (or wise) use, and integration of environmental protection and development.¹¹ Secondly, the substantive characteristics are supported by a network of *supplementary principles* applied in order to give effect to the above characteristics and contribute to the overall achievement of the objective. Such principles include co-operation (or good neighbourliness), the principle of precaution, and the polluter pays principle. Finally, the *procedural techniques* of environmental impact assessment and public participation contribute to the practical implementation of the sustainable tourism principle.

Given that the definition of sustainable tourism emanates from the principle of sustainable development, it follows that in order to determine whether there exists a legal obligation in relation to sustainable tourism, the framework of sustainable development should be employed as a mechanism for examining sustainability within the tourism industry. This then allows for a conclusion to be reached as to whether there exists a legal

¹¹ See P.Sands *Principles of International Environmental Law* (Cambridge: CUP 2003 2nd edition) 252-256; V.Lowe 'Sustainable Development and Unsustainable Arguments' in A.Boyle and D.Freestone (eds.) *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: OUP, 1999) 26.

obligation relating to sustainable tourism, and if so, what this might entail. Thus, each of the concepts identified as comprising the substantive characteristics, supplementary principles, and procedural techniques of sustainable tourism are examined in this chapter, in order to determine the existence of a legal obligation for sustainable tourism in the context of international law.

4.1 Substantive Characteristics of Sustainable Tourism

4.1.1 Equitable Utilisation: A Mechanism for Balancing Priorities

International law has adopted the principle of equitable utilisation¹² in respect of environmental issues, especially as a technique for aiding in the allocation of shared natural resources.¹³ In such situations, different interests are taken into account in order to determine the most just or equitable outcome for all states concerned. Because each individual situation requires a different compromise and any reconciliation must take into consideration the particular factors involved, there lacks any consensus

¹² Compare the principle of equity in international law. See e.g. M.Shaw *International Law* (Cambridge: Grotius, 2003 5th edition) 99-103; V.Lowe 'The Role of Equity in International Law' 12 *Australian Year Book of International Law* (1992) 54; R.Higgins *Problems and Processes: International Law and How We Use It* (Oxford: Clarendon Press, 1994) ch. 13; O.Schachter *International Law Theory and Practice* (Dordrecht: Nijhoff Publishers, 1991) 49; M.Akehurst 'Equity and General Principles of Law' 25 *ICLQ* (1976) 801; and S.Chattopadhyay 'Equity in International Law: Its Growth and Development' 5 *Georgia Journal of International and Comparative Law* (1975) 381.

¹³ For example see *Icelandic Fisheries (United Kingdom v Iceland)* ICJ Reports (1974) 3, where it was concluded that common property fish stocks must be allocated equitably.

as to the definitive meaning of equitable utilisation.¹⁴ However, the international community has reached some agreement, for example, by concluding a set of indicators for 'equitable and reasonable utilisation' in respect of international watercourses.¹⁵

The idea of balancing priorities, which is fundamental to the principle of equitable utilisation, is similarly integral to sustainable tourism. The relationship between environmental protection and economic development plainly requires a degree of reconciliation and equitable utilisation is used as a mechanism for achieving this balance. This is evidenced by the frequent inclusion of the equitable utilisation principle in international instruments, especially those concluded as part of the United Nations Conference on Environment and Development (UNCED), where the relationship between environment and development was the focus of negotiations.¹⁶ More specifically, international environmental law has employed the idea of equitable utilisation as one of the substantive characteristics of sustainability, where it can be identified as existing in one of three different forms.

¹⁴ P. Birnie and A. Boyle *International Law and the Environment* (Oxford: OUP, 2002 2nd edition) 146-147.

¹⁵ See the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, where Article 5(2) provides that 'watercourse states shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner'. Article 6 then sets out a number of factors and circumstances to be taken into account in order to determine the equitable and reasonable utilisation of international watercourses, such as: natural characteristics, social and economic needs, population dependency, existing and potential uses for the watercourse, conservation and economical use, and availability. Also, compare Article 10 of the International Law Commission's Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (adopted at the 53rd session of the ILC, 2001).

¹⁶ The principle of equitable utilisation is prominent in all documents emanating from UNCED, e.g. Climate Change Convention, article 3(1); Convention on Biological Diversity, article 1; Rio Declaration, principle 3; Agenda 21, paragraph 2.1; and the Forest

(a) Intergenerational Equity

The concept of intergenerational equity was established in the context of fairness and equity between generations. This temporal approach prescribes that the environment must be protected and preserved for the benefit of both present and future generations.¹⁷ Founded in the idea of a trust, intergenerational equity reflects the right of each generation to benefit from and develop its heritage, coupled with the obligation to use this heritage in such a manner that it can be passed on to future generations in no worse condition than it was received from past generations.¹⁸ The concept focuses on the 'conservation of options' for future generations, whereby since the present generation cannot adequately anticipate the needs of future generations, the best alternative is to leave sufficient options of choice for them.¹⁹ Whilst intergenerational equity has received a great deal of attention in international law, its legal status remains

Principles. For a discussion on sustainable development and the instruments concluded as a part of UNCED see, Sands, note 8, p. 303.

¹⁷ For a discussion on the concept of intergenerational equity, see e.g. E. Weiss *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Tokyo: United Nations University Press, 1988); E. Agius and S. Busuttil (eds.) *Future Generations and International Law* (London: Earthscan, 1998); 1988 Goa Guidelines on Intergenerational Equity, Appendix A; C. Redgwell, *Intergenerational Trusts and Environmental Protection* (Manchester: MUP, 1999); A. D'Amato 'Do We Owe a Duty to Future Generations to Preserve the Global Environment?' 84 *AJIL* (1990) 190; E. Weiss 'Our Rights and Obligations to Future Generations for the Environment' 84 *AJIL* (1990) 198; L. Gundling 'Our Responsibility to Future Generations' 84 *AJIL* (1990) 207.

¹⁸ 1988 Goa Guidelines on Intergenerational Equity. The principle of intergenerational equity is derived from the theory of the 'veil of ignorance' described by J. Rawls in *A Theory of Justice* (Oxford: OUP, 1999) 118-123.

¹⁹ Weiss suggests that the three options which should be conserved for future generations in accordance with the principle of intergenerational equity are the (i) conservation of options, (ii) conservation of quality, and (iii) conservation of access. See E. Weiss *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Tokyo: United Nations University Press, 1988) 34.

uncertain. It has been discussed in judicial decisions²⁰ and referred to in numerous international and regional agreements;²¹ however, the idea that intergenerational equity might create a specific legal obligation towards future generations has yet to be fully translated into an independent principle of international law.²²

The concept of intergenerational equity is one of the most commonly referred to principles in international environmental law as a result, primarily, of its close association with the objective of sustainable development. As a justification for environmental protection, future generations undeniably represent a deserving beneficiary.²³ Accordingly, a reference to equity between generations can be found in almost all agreements with an environmental conscience. It is most often recognised as a justification for action – a way of encouraging states to act in order to guarantee an acceptable standard of environmental resources for all

²⁰ E.g. *Request for an Examination of the Situation in Accordance with paragraph 63 of the Court's 1974 Judgment in the Case Concerning Nuclear Tests (New Zealand v France)* case 1995 ICJ Reports 288 at 341; and *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* 1997 ICJ Reports 7 at 110, 118 where Weeramantry (in separate opinions) promotes the importance of intergenerational equity in international law. In *Minors Oposa v Secretary of the Department of Environment and Natural Resources* 173 at 185, the Supreme Court of the Philippines granted *locus standi* for petitioners to represent both the present and future generations.

²¹ E.g. see its inclusion in the preamble to the following conventions: 1946 International Convention for the Regulation of Whaling; 1968 African Convention on the Conservation of Nature and Natural Resources; 1992 United Nations Framework Convention on Climate Change; and 1997 Convention on the Law of the Non-navigational Uses of International Watercourses.

²² Following the recognition by courts of its procedural status (ie. in granting *locus standi* to future generations), intergenerational equity may indirectly have normative status as parties are able to bring action based on that principle. However, the cases where *locus standi* have been granted are restricted to regional or municipal hearings, as opposed to international disputes in the ICJ. Nonetheless, note the separate opinions of Judge Weeramantry in the ICJ in *Request for an Examination and Gabcikovo-Nagymaros Project* where the normative status of intergenerational equity is supported.

²³ For further discussion on this point, see A.Gillespie *International Environmental Law, Policy and Ethics* (Oxford: OUP, 1997) 107-126.

generations.²⁴ The manner in which intergenerational equity has been adopted and implemented in respect of tourism is explored below.

Tourism for Future Generations?

Conceivably, it could be argued that any reference to future generations has an implied impact on tourism. If we accept that future generations include 'future tourists', then the numerous occasions in which intergenerational equity is included in international agreements and political declarations can similarly be applied to the tourism industry. However, because of the uncertain legal effect of the principle in international environmental law, an analysis of the different situations where intergenerational equity is employed may shed light on the specific effect of the principle on tourism. Thus, the most significant situations where the principle of intergenerational equity impacts on the tourism industry are outlined.

²⁴ There are three slightly different approaches in the way in which the intergenerational equity justification has been adopted. First, in some of the earliest applications of the principle, intergenerational equity was utilised for the purpose of curbing exploitation levels and conserving natural resources, in order to ensure future generations would similarly be able to harvest these stocks (e.g. 1898 *Bering Sea Fur Seals Fisheries Arbitration (Great Britain v United States)*; 1946 International Convention for the Regulation of Whaling). This early perception of the environment, as a compilation of exhaustible resource stocks, shifted during a period beginning in the early 1970s at which point intergenerational equity became focused on preservation of the environment simply for 'the benefit of future generations' (e.g., 1972 Stockholm Declaration, principle 2; 1972 World Heritage Convention, article 4; 1973 CITES, preamble). Finally, with the increased use of the sustainable development concept following the Brundtland Report in 1987, intergenerational equity again shifted emphasis 'to meet the needs of future generations', thus placing greater emphasis on developmental (as well as environmental) needs (see e.g. 1992 Rio Declaration, principle 3; 1992 Convention on Biological Diversity, article 2 definition of 'sustainable use'; 1992 Convention on the Protection and Use of Transboundary Watercourses and Lakes, article 2(5)(c)). This changing trend reflects the well-established path of many environmental principles from nature as a resource stock – to nature possessing an increasingly inherent value – to nature's intrinsic relationship with developmental needs.

The interests of 'future generations' have been incorporated in a number of international instruments including, notably, the Stockholm and Rio Declarations,²⁵ as well as in political declarations concluded by international tourism organisations.²⁶ The recognition of the intergenerational equity concept in this non-legal context undoubtedly provides some support for its role as a characteristic of sustainable tourism; however, a more convincing endorsement of this proposition is provided by

²⁵ Whilst the interests of 'future generations' were mentioned in Principles 1 and 2 of the Stockholm Declaration (on the *human environment*) and Principle 3 of the Rio Declaration (on *environment and development*), the Johannesburg Declaration (on *sustainable development*) fails to make any direct reference to either future generations or intergenerational equity. In what should represent the third major instalment in the global articulation of the environment and development relationship an integral characteristic of the sustainable development objective is notably missing. (The Johannesburg Declaration makes a number of general comments regarding the 'future' possibly implying some notion future generations, but nonetheless remains far from any recognition or acknowledgement of the intergenerational equity principle. Furthermore, the Johannesburg Plan of Implementation neglects to make any reference to future interests whatsoever.) However, to pre-empt any ensuing debate as to the implied significance and resulting implications of such an apparently intentional omission, it must be noted that Johannesburg's political declaration differs from its predecessors in both form and content. Whereas the Stockholm and Rio Conferences resulted in a document of basic principles describing to a large extent the rights and obligations of states with respect to the environment, the Johannesburg Declaration represents a commentary on developments since the Stockholm conference and describes future challenges for sustainable development. Accordingly, whilst principles included in the Stockholm and Rio Declarations possess greater significance (and in some circumstances potentially customary-law status), the Johannesburg equivalent is incomparable not only in terms of its form and content, but also in respect of its ambition. For a discussion on the outcomes of the Johannesburg Summit, see e.g. K.Gray 'World Summit on Sustainable Development: Accomplishments and New Directions?' 52(1) *ICLQ* (2003) 256; A.Marong 'From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development' 16(2) *Georgetown International Environmental Law Review* (2003) 21; G.Pring 'The 2002 Johannesburg World Summit on Sustainable Development: International Environmental Law Collides with Reality, Turning Jo'burg into "Joke'burg"' 30(3) *Denver Journal of International Law and Policy* (2003) 410.

²⁶ E.g. 1980 Manila Declaration on World Tourism, Part B 'Better Management of Supply'; 1985 Sofia Tourism Bill of Rights and Tourist Code, article III(e); 2002 Quebec Declaration on Ecotourism, preamble. The Manila Declaration is a non-binding political declaration – the result of the 1980 World Tourism Conference convened by the WTO and attended by 107 state and 91 observer delegates. The Sofia Tourism Bill of Rights is a set of principles concluded by the 1985 General Assembly of the WTO which, whilst are encouraged to be applied by states, have no binding effect. The Quebec Declaration is a non-negotiated, non-binding document – the result of a multi-stakeholder dialogue at the World Ecotourism Summit. This Summit was held under the aegis of UNEP and the WTO with more than 1,000 participants from the public, private and non-governmental sectors.

an analysis of its inclusion in legally-binding international conventions and treaties.

As with all aspects of international law, greater significance can be attributed to a principle when it is included in agreements intended to impose binding obligations negotiated and adopted by states. Moreover, such agreements tend to target specific areas of interest, drawing upon greater technical expertise and clearer commitment to a common goal – as opposed to the often more general political declarations described above.

Within international environmental law, the concept of intergenerational equity has two distinct parts. First is the operative aspect, or the action required by the principle, most often appearing in the form of prevention, preservation or conservation, whilst the second part describes the justification for taking such action – that is, to protect future generations. This is clearly demonstrated by the Brundtland definition which provides ‘...the environment must be protected and preserved [*action required*] for the benefit of both present and future generations [*justification*].’ This approach towards intergenerational equity has been widely adopted within international environmental law and can consequently be seen as a justification for environmental protection in respect of tourism activities. Most notably, future generations have been employed as motivation to protect the climate system,²⁷ manage water resources,²⁸ protect wild fauna

²⁷ UNFCCC, preamble and article 3(1).

²⁸ 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (31 ILM 1312), article 2(5)(c).

and flora,²⁹ and ensure the utilisation, development, conservation, management and protection of international watercourses.³⁰ As a result, these agreements create an obligation to protect, manage, or conserve the various resources specified.³¹ Whilst each of these agreements may have some impact on the tourism industry, the 1972 World Heritage Convention for the Protection of the World Cultural and Natural Heritage (World Heritage Convention) offers a particularly relevant example of a situation where the intergenerational equity principle impacts directly upon tourism, since it creates an obligation not only to ensure 'the identification, protection, conservation ...[and]... presentation' of the cultural and natural heritage, but also for its 'transmission to future generations'.³² Thus, future generations do not appear merely as the justification for action (as in other agreements), but rather, are included in the operative part of the principle. This seemingly creates an additional obligation to pass or hand on to future generations cultural and natural heritage currently enjoyed by present generations – rather than simply rely on future generations as a justification for action. The Convention clearly adopts the essence of the intergenerational equity principle by embracing the theory of generational trust and recognising the resulting obligations.³³ The wording in the World Heritage Convention arguably imposes a higher burden of proof on parties, as states become responsible for the 'transmission' of heritage to future

²⁹ CITES, preamble.

³⁰ 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses (36 ILM 700), preamble.

³¹ Note that the 1992 Convention on Biological Diversity also employs the justification of future generations. However, this Convention is discussed *infra* 4.1.2 on sustainable utilisation, as it provides a greater capacity for discussion in this context.

³² WHC, article 4.

generations, in addition to its conservation. Tourism activities are shaped and affected by this international equity obligation, because of the large number of world heritage sites that also function as major tourist attractions.

The recognition by the Convention of natural and cultural sites as possessing outstanding universal value, to be preserved as part of the world heritage of mankind as a whole targets areas of obvious attraction to tourists.³⁴ With the subscription of sites such as the Great Wall of China,³⁵ the Galápagos Islands,³⁶ the Acropolis,³⁷ the Taj Mahal,³⁸ and Sagarmatha (Mount Everest) National Park in Nepal,³⁹ the World Heritage Convention contributes directly to the conservation and management of some of the world's most significant tourist attractions. The characteristics of the site itself, together with the status of being recognised by the World Heritage Convention, mean that tourism activities will often be a significant factor to be addressed in the management of the site.⁴⁰

³³ The concepts of intergenerational trusts and planetary obligations are discussed in many texts regarding equity between generations. For an overview of these ideas, see e.g. Weiss (1988), note 17, p. 47; Redgwell, note 17, p. 71.

³⁴ WHC, preamble.

³⁵ Inscribed in 1987 under cultural criteria (i) (ii) (iii) (iv) (vi), as set out in the Operational Guidelines to the Convention.

³⁶ Inscribed in 1978 (and extended in 2001) under natural criteria (i) (ii) (iii) (iv), as set out in the Operational Guidelines to the Convention.

³⁷ Inscribed in 1987 under cultural criteria (i) (ii) (iii) (iv) (vi), as set out in the Operational Guidelines to the Convention.

³⁸ Inscribed in 1983 under cultural criteria (i), as set out in the Operational Guidelines to the Convention.

³⁹ Inscribed in 1979 under natural criteria (iii), as set out in the Operational Guidelines to the Convention.

⁴⁰ For a full list of the properties inscribed as World Heritage Sites, see the website <<http://whc.unesco.org/pg.cfm?cid=31>>.

As a substantive characteristic of sustainable tourism, intergenerational equity provides one method for attempting to reconcile environmental and developmental priorities. However, it remains in general more akin to a justification for environmental protection than a tangible legal obligation, although the World Heritage Convention does appear to attempt to impose a stricter interpretation. Interestingly, for a principle with minimal legal effect, on the occasions in which the concept is employed, agreements and declarations refer to the idea of future generations as opposed to including the actual term 'intergenerational equity'. This approach may reflect a desire by states to recognise the interests of future generations, but without necessarily according them parity, which the concept of intergenerational equity might be interpreted to require. Nevertheless, following the discussion of 'intergenerational rights' by Vice-president Weeramantry in the International Court of Justice,⁴¹ the status of the concept may now be recognised as evolving and gathering momentum in international law.

In applying the intergenerational equity concept to the tourism industry, it is obvious that the characteristics of planetary trust and guardianship for future generations – also synonymous with sustainable development – are equally applicable to the objective of sustainable tourism. The notion of intergenerational equity within tourism means that both present and future tourists and tourism providers will be able to meet their needs – a fundamental component of which is the preservation of the natural

⁴¹ E.g. Separate Opinion of Vice-President Weeramantry in the *Gabcikovo-Nagymaros Dam Case (Hungary v Slovakia)* ICJ Reports (1997) 7; and the dissenting judgement of Judge Weeramantry in the *Request for an Examination of the Situation in Accordance with*

environment upon which not only tourism, but also humanity's continuing existence, is dependent. In the context of tourism, sustainability offers the traditional approach of balancing conflicting priorities, most notably those of development and the environment, but consideration is also paid to the interests of cultural traditions, trade and industry occurring across generations. Accordingly, the notion of equity among generations can be identified as the first characteristic of sustainable tourism.

(b) Intra-generational Equity

Established in earlier ideas of equity between states, the notion of intra-generational equity offers a complementary approach to the attainment of sustainable tourism.⁴² Whilst the principle of *intergenerational* equity refers to the temporal distribution of equity, *intra-generational* equity is based upon sustainable development and the achievement of equity within the present generation. In addressing the spatial dimension,⁴³ intra-generational equity attempts to remedy the imbalance between developed and developing states by giving priority to the needs of the poor.⁴⁴ However, whilst both approaches target a different application of equity,

Paragraph 63 of the Court's Judgement of 20 December 1974 in the Nuclear Tests case (New Zealand v France) ICJ Reports (1995) 288.

⁴² The theory of equity between states gained additional impetus with the conclusion in 1974 of the New International Economic Order (NIEO) by the UN General Assembly. The NIEO was a political attempt by developing states to reach some equitable balance in international economic relations and trade. Given, the extensive concession required by developed states in order for the NIEO to be successful in its objectives, it soon became apparent that it would have no tangible impact on the international system. For further discussion see e.g. U.Baxi 'The New International Economic Order, Basic Needs and Rights: Notes Towards Development of the Right to Development' 23 *Indian Journal of International Law* (1983) 225.

⁴³ For a discussion on the differences between temporal and spatial groups and moreover, which group deserves priority, see C.Stone 'Safeguarding Future Generations' in E.Agius

they are in reality integrated and reliant upon each other. The promotion of intergenerational equity becomes distorted if environmental burdens and benefits are not equally shared between the members of the present generation. In such a situation, intergenerational burdens may be allocated to one part of the international community, whilst intergenerational benefits are allocated to another.⁴⁵ This is clearly illustrated in the example of the exportation of hazardous waste, where members of the present generation enjoy a benefit (such as receiving payment for the disposal of toxic waste) for which there is no countervailing advantage for future generations.⁴⁶ However, where intra-generational equity is correctly applied, members of all generations – both present and future – should enjoy the same intergenerational benefits and burdens.⁴⁷

To date no international agreement or treaty has gone so far as to include verbatim 'intra-generational equity' in its written text. Yet the notion of equity (or equitable sharing) which underlies the principle is scattered throughout virtually all aspects of international environmental law, most often used to highlight the special needs of developing countries and in attempt to redistribute economic wealth and resources equitably between

& S. Busuttil (eds.) *Future Generations and International Law* (London: Earthscan, 1998) 76-78.

⁴⁴ Birnie and Boyle, note 14, p. 91-92.

⁴⁵ Weiss (1988), note 17, p. 21.

⁴⁶ Redgwell, note 17, p. 109-110.

⁴⁷ E.g. Article 3(1) of the 1992 Climate Change Convention provides that parties should 'protect the climate system for the benefit of present and future generations ... on the basis of equity and in accordance with their common but differentiated responsibilities'. This provision *inter alia* encourages an intra-generational approach toward the distribution of climate obligations in order to ensure intergenerational equity regarding climate benefits – the burden is distributed spatially in order to allow benefit to be enjoyed temporally.

all members of the current international community.⁴⁸ As the gap between North and South grows wider, intra-generational equity offers a form of 'distributive justice' whereby developed states are morally bound to distribute resources to poorer countries in order to ensure 'a more equal world'.⁴⁹ It is worth noting, however, that industrialised countries vigorously refute any suggestion they are under an obligation to provide developmental assistance, instead asserting that all aid is provided voluntarily.⁵⁰ A principle such as intra-generational equity that focuses on the disparity between North and South is a fundamental mechanism for addressing environmental problems, so many of which are created by development and the industrialisation process. Moreover, the principle of equity within the present generation has been implemented by way of various specific mechanisms. Obligations on developed states for the transfer of technology,⁵¹ provision of financial resources⁵² and international assistance⁵³ in respect of developing states have become common place in international agreements relying on global cooperation.

⁴⁸ Closely linked to the concept of intra-generational equity is the principle of 'common but differentiated responsibilities' where the special needs of developing countries must be taken into consideration in the development of international environmental law. Specifically, whilst states have a *common responsibility* towards an environmental resource, their *differentiated responsibility* must be recognised in respect of the environmental standards established taking into consideration factors such as economic development, technological capability, and any historical contribution to an environmental problem. For further elaboration on the principle, see Sands, note 11, p. 217-220; Birnie and Boyle, note 14, p. 100-104.

⁴⁹ D.French 'International Environmental Law and the Achievement of Intragenerational Equity' 31 *Environmental Law Reporter* (2001) 10469.

⁵⁰ *Ibid.*

⁵¹ See Convention on Biological Diversity, article 16; UNFCCC, article 4(5).

⁵² See Convention on Biological Diversity, articles 20 and 21; UNFCCC, articles 4(3) and 4(4).

⁵³ WHC, articles 19 to 26.

Benefits and Burdens of Tourism – Ensuring an Equitable

Distribution for All

The idea of sustainable tourism implies long-term temporal sustainability in accordance with intergenerational equity discussed above. This stems from the notion of 'sustainability' reflecting the needs of future generations, as opposed to the conservation and equitable distribution of resources within the present generation. However, intra-generational equity is also an important characteristic of the sustainable tourism objective, and as such, may be a valuable tool to employ when concluding a definition.

The idea that the benefits and burdens of tourism should be shared between all members of the present generation has featured in tourism-specific declarations concluded by both states⁵⁴ and international organisations.⁵⁵ However the limited legal status of these documents – as non-binding declarations – mean they are of little more than guidance value in international law. Nonetheless, the notion of intra-generational equity has also appeared in international environmental treaties, which are subsequently applicable to tourism activities.

⁵⁴ 1995 Lanzarote Charter for Sustainable Tourism, paragraph 10. The Lanzarote Charter is the result of the World Conference on Sustainable Tourism attended by state delegates and tourist experts, the result of which is a sustainable tourism strategy in the form of a non-binding charter.

⁵⁵ 1989 Hague Declaration on Tourism, preamble, paragraph 6; 1999 Global Code of Ethics for Tourism, article 7(1). The Hague Declaration is a non-binding document, the result of the Inter-Parliamentary Conference on Tourism co-ordinated jointly by the Inter-Parliamentary Union (IPU) and the World Tourism Organisation. For further information on the IPU see <<http://www.ipu.org/english/home.htm>>. The Global Code of Ethics for Tourism was adopted as Resolution A/RES/406(XIII) of the WTO General Assembly by

One such example relates to the use of international watercourses, generally being identified as rivers, lakes, and groundwater sources territorially shared by two or more states.⁵⁶ Tourism activities utilise and impact on these international watercourses in a multitude of ways. With rivers, lakes and groundwater constituting the major supply of freshwater resources for human activity, the implications for the tourism industry of water shortages or pollution are obvious. Thus, the manner in which international watercourses are managed will have a direct impact on the ability of the tourism industry to continue its operations. International agreements governing these resources have employed the principle of equitable utilisation, common to situations concerning resources with multiple state interests. This principle involves balancing interests fundamental to the equity doctrine in international law, but applies spatially rather than temporally, thus aligning itself with the idea of intra-generational equity. Notably, the 1992 UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992 Transboundary Watercourses Convention) provides that state parties shall 'ensure that transboundary waters are used in a reasonable and equitable way ... in the case of activities which cause or are likely to cause transboundary impact'.⁵⁷ The term 'transboundary impact' is defined widely to include significant adverse effect on the environment caused by

members of the WTO (including representatives of the world tourism industry, and delegates from states, enterprises, institutions and bodies).

⁵⁶ This is the general understanding of the term international watercourses – for more detail see the specific definitions in *inter alia* 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, article 1(1); 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, article 2.

⁵⁷ 1992 Transboundary Watercourses Convention, article 2(2)(c).

human activity.⁵⁸ The anthropogenic requirement clearly reflects the many activities associated with the tourism industry from water consumption by holidaymakers, to leisure activities utilising water resources, to waste and sewage disposal via such watercourses. The principle of the equitable and reasonable use of transboundary watercourses was provided with further impetus with the conclusion of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses (1997 International Watercourses Convention) which provides that international watercourses should be used, developed and protected in an 'equitable and reasonable manner'.⁵⁹ However, this Convention goes a step further than the earlier watercourse agreements⁶⁰ by outlining a number of relevant factors to be taken into account in determining 'equitable and reasonable utilisation'.⁶¹ The inclusion of both positive and negative consequences relating to, *inter alia*, natural character, social and economic needs, population dependency, conservation, and the availability of alternatives, emphasises the wide scope within which equitable utilisation is assessed as impacting on members of present generations. However, it should be noted that whilst both watercourse conventions recognise equity between the various elements of the present generation, this is limited in its application to

⁵⁸ 1992 Transboundary Watercourses Convention, article 1(2), defines effects on the environment so as to include '...effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors...[and]...effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors'.

⁵⁹ 1997 International Watercourses Convention, Article 5.

⁶⁰ In addition to the 1992 Transboundary Watercourses Convention, the International Law Association (ILA) also concluded the 1966 Helsinki Rules on the Uses of the Waters of International Rivers, which is restricted to guidance status within international law. However, these ILA rules are currently under revision with the seventh draft of the Revised ILA Rules on Equitable and Sustainable Use in the Management of the Waters (March 2002) currently under consultation. See the Water Resources Law Committee on the ILA website at <http://www.ila-hq.org/html/layout_committee.htm>.

successive generations of participating states. This is a product of the consent-based, positivist international legal system. As a result, a principle such as intra-generational equity can often be found in international treaties, but may only be legally applicable to consenting state parties.

There is a significant risk of both the burdens and benefits of tourism activities being distributed in a manner inconsistent with intra-generational equity. First, the very nature of the industry means that a high proportion of tourism activities are based on exploitation of aspects of the natural environment. Hence, a concentration of natural tourism resources in one area encourages a conglomeration of benefits (and potentially burdens), which may be absent in other communities. Secondly, a danger exists of one community receiving many of the benefits, whilst another (such as the neighbouring area utilised for access) receives the disproportionate partnering burden. Finally, where a primarily consumptive form of tourism is undertaken, there exists a significant risk that, upon exhaustion of one set of consumable resources, the industry will simply relocate to another area. These scenarios illustrate the importance of attaining some level of intra-generational equity in order to contribute towards the objective of sustainable tourism. Where the benefits and burdens of an activity can be equitably distributed (in a spatial sense), there is an increased likelihood of tourism being undertaken in a sustainable manner. Furthermore, the presence of intra-generational equity encourages a more accurate distribution within intergenerational equity.

⁶¹ 1997 International Watercourses Convention, Article 6.

(c) *A New Approach – Stakeholder Equity*

In addition to the more well-known principles of intra-generational and intergenerational equity, tourism offers a third set of interests which would similarly benefit from an equitably balanced approach. There are numerous participants and stakeholders within the tourism industry ranging from transnational corporations, to local tourist operators, to indigenous communities, to the individual tourists themselves. Each of these participants has differing priorities and values, based largely on the nature of its interest and involvement in the industry's activities. An additional type of equity – stakeholder equity – provides an attempt at balancing the interests amongst these various groups within the context of a specific tourism venture and, moreover, is structured specifically for the characteristics of the tourism industry. Thus, 'stakeholder equity' considers the participants of a particular tourism activity and attempts to achieve some level of equitable distribution of the associated benefits and burdens between those participants. It offers a more detailed analysis of the specific characteristics of each activity and the various participants involved. This idea has been alluded to by the WTO in the Global Code of Ethics for Tourism where 'partnership and the establishment of balanced relations between enterprises of generating and receiving countries' are encouraged in order to 'contribute to the sustainable development of tourism and an equitable distribution of the benefits of its growth'.⁶² Suggestions that a new variation of equity is emerging would currently

remain premature, with the non-binding status of the Code of Ethics offering little by way of normative force. Nevertheless, the characteristics of the tourism industry would be ideally suited to a principle which attempts to attain an equitable balance of interests between such diverse stakeholders, so this may in fact represent a first step down the long road to achieving 'stakeholder equity'.

4.1.2 Limits to Sustainability: the Principle of Sustainable Utilisation

The next facet of sustainable tourism is the sustainable (or wise) utilisation of natural resources. As a norm it can be difficult to clarify because the exact terminology in which this characteristic is expressed varies to some extent, despite its meaning remaining essentially unchanged. Some earlier environmental agreements refer to the principle as 'maximum sustainable yield',⁶³ 'optimum sustainable yield'⁶⁴ or 'optimum utilisation'⁶⁵ on what appears to be an interchangeable basis.⁶⁶ Whilst the principle must inevitably be interpreted in its specific context, broadly, sustainable

⁶² 1999 Global Code of Ethics for Tourism, article 9(6).

⁶³ UNCLOS, article 61(3), 1982.

⁶⁴ 1958 Convention on Fishing and the Conservation of the Living Resources of the Sea (559 UNTS 285), article 2; 1972 Convention for the Conservation of Antarctic Seals (11 ILM 251), preamble.

⁶⁵ UNCLOS, article 62(1). Note in the Article directly preceding this, the term 'maximum sustainable yield' is used.

⁶⁶ For a discussion on the relationship between the concepts of 'maximum sustainable yield' and 'optimum utilisation' in the context of high sea fisheries conservation, see e.g. D. Freestone 'International Fisheries Law Since Rio: The Continued Rise of the Precautionary Principle' in A. Boyle & D. Freestone (eds.) *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: OUP, 1999) at 147.

utilisation implies the adoption of standards to restrict the exploitation of specific renewable resources, so that the process may continue indefinitely.

The use of sustainable utilisation as a technique for managing natural resources has been especially prevalent in the field of marine resources, where a number of conservation agreements have employed some variation of the principle. The imposition of catch limits to ensure the on-going sustainable utilisation of a particular species has proved crucial for many common marine resources open to exploitation by all states.⁶⁷ More recently, however, the principle has expanded and been adopted as a technique in the conservation of a variety of natural resources.⁶⁸

Difficulties arise however, when deciding how the principle of sustainable utilisation should be interpreted as a general norm. For example, early conservation trends in respect of whaling adopted a general 'sustainable utilisation' approach, whereby whaling was permitted so long as it remained sustainable as a global industry, irrespective of various species depletion. Similarly, sustainable utilisation may overlook the depletion of regional stocks in favour of a global sustainability approach, thereby threatening the diversity of the species.⁶⁹ Accordingly, it has been suggested that sustainable utilisation may generally be recognised more in

⁶⁷ E.g. 1946 International Convention for the Regulation of Whaling (338 UNTS 336), article V; 1976 Convention on Conservation of North Pacific Fur Seals, article II; 1993 Convention for the Conservation of Southern Blue Fin Tuna (1819 UNTS 360), article 3; 1995 Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (34 ILM 1542), article 5.

⁶⁸ E.g. 1982 World Charter for Nature, principle 1(4); 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources, article 1(1); 1994 International Tropical Timber Agreement, article 1; 1997 Convention on Non-navigational Uses of International Watercourses, article 5.

the form of a policy than a legal principle.⁷⁰ Nonetheless, despite ambiguity regarding the concept's definition and application, a recent International Law Association (ILA) Declaration has gone so far as to place states⁷¹ under a duty to manage natural resources in a rational, sustainable and safe way, with particular regard to the 'sustainable use of natural resources and the protection of the environment'.⁷² The nature of this Declaration is essentially a guidance document and thus restricted in its applicability, as opposed to one which creates international binding commitments. However, the ILA undertakes extensive legal research into many areas of international law and it is likely that its resolutions indicate, at the very minimum, an emerging international concept to be considered by states.⁷³

Finally, the concept of sustainable utilisation has also been adopted by the 1992 Convention on Biological Diversity (CBD), which defines sustainable use as 'the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations'.⁷⁴ However, as with earlier international environmental

⁶⁹ Lowe, note 11, p. 29.

⁷⁰ *Ibid.*

⁷¹ Note that Principle 1.2 of the ILA Declaration also places a duty on all relevant actors (including states, industrial concerns and other components of civil society) to avoid wasteful use of natural resources and promote waste minimisation policies.

⁷² 2002 ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development (Resolution 3/2002), principle 1.2. See the ILA website <http://www.ila-hq.org/html/layout_committee.htm>.

⁷³ For further discussion by the ILA on the duty to ensure sustainable use of natural resources, see ILA 2002 New Delhi Conference – *Legal Aspects of Sustainable Development 5th Report – Searching for the Contours of International Law in the Field of Sustainable Development* at 8.

⁷⁴ CBD, article 2.

agreements, sustainable utilisation is defined in the CBD in such a way so as to remain vague and difficult to quantify.

The Sustainable Utilisation of Tourism Resources

The sustainable utilisation of resources within the tourism industry is of paramount importance. With virtually all tourism activities involving the exploitation of some aspect of the natural environment, it is crucial that tourism resources are utilised in a sustainable manner so as to ensure the future both of the tourism industry, and of the environment. Thus, where tourism activities are responsible for the exploitation of either primary or secondary natural resources, standards must be established in order to restrict exploitation and ensure activities are undertaken in a sustainable manner.

Whilst there are many agreements within international environmental law that have adopted sustainable utilisation as a management technique,⁷⁵ there are two conventions that demonstrate a particularly significant impact on the tourism industry. First is the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat (the Ramsar Convention).⁷⁶ This convention represents one of the earliest agreements

⁷⁵ E.g. 1946 International Convention on the Regulation of Whaling, preamble; 1968 African Convention on the Conservation of Nature and Natural Resources, preamble; 1972 Stockholm Declaration, principle 4; 1982 World Charter for Nature, principles 4 and 10(a); 1997 Convention on the Non-navigational Uses of International Watercourses, preamble and article 5.

⁷⁶ For a discussion on the mechanics of the Ramsar Convention, and its developments, see respectively, M.Bowman 'The Ramsar Convention Comes of Age' *Netherlands International Law Review* (1995) 1-52 and M.Bowman 'The Ramsar Convention on Wetlands: Has it Made a Difference?' *Yearbook of International Cooperation on*

to employ the sustainable utilisation idea – although it is described in the text of the Convention as ‘wise use’.⁷⁷ Parties to the agreement are required to ‘promote the conservation of the wetlands included in the List ... and the wise use of wetlands in their territory’.⁷⁸ The ‘wise use of wetlands’ has been interpreted by the conference of the parties to the Ramsar Convention to mean the ‘sustainable utilisation for the benefit of humankind in a way compatible with the maintenance of the natural properties of the ecosystem’.⁷⁹ Moreover, sustainable utilisation was also defined as the ‘human use of a wetland so that it may yield the greatest continuous benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations.’⁸⁰ These definitions fundamentally rely on anthropogenic uses of wetlands as a justification for conservation. It is worth noting, however, that conservation in this respect means a sustainable form of utilisation, rather than a prohibitive, “preservationist” approach. Nonetheless, this human-orientated

Environment and Development (2002/03) 61-68. For further general information on the Ramsar Convention see the website <<http://www.ramsar.org/>>.

⁷⁷ Whilst the Convention distinguishes between ‘wise use’ (of wetlands) and ‘conservation’ (of designated sites), there has been a shift by the Ramsar Secretariat to recognise both conservation and wise (sustainable) use as the first step along a pathway, “...the endpoint of which is achieving the long-term wise (sustainable) use of the site”. Accordingly, it may be inferred that whilst different terms have been used throughout the Convention (which suggests differing meanings within the broader context of international environmental law), it is intended that – in respect of Ramsar obligations – the principle of wise (or sustainable) utilisation is the ultimate end objective. See the Ramsar Resolution VII.11 (Annex paragraph 23) adopted at COP 7 (1999).

⁷⁸ 1971 Ramsar Convention, article 3(1).

⁷⁹ The 3rd Meeting of the Conference of the Parties to the Ramsar Convention in Regina, Canada (27 May to 5 June 1987) adopted a set of ‘guidelines for the implementation of the wise use concept’. The Guidelines were first adopted as an Annex to Recommendation 4.10 of the 4th Meeting of the Conference of the Parties (Montreux, Switzerland, 1990). Furthermore, Additional Guidelines for the Implementation of the Wise Use Concept were adopted as an Annex to Resolution 5.6 of the 5th Meeting of the Conference of the Parties (Kushiro, Japan, 1993). For details see the website <http://www.ramsar.org/key_guidelines_index.htm>.

⁸⁰ Annex to Recommendation 3.3 on the Wise Use of Wetlands, 3rd Meeting of the Conference of the Parties to the Ramsar Convention 1987.

perspective is well suited to the tourism industry, where risk of environmental harm is founded entirely in anthropocentric activities.

In addition, the Ramsar Convention Bureau established the 'Wise Use Resource Centre' in order to provide a concrete body of materials for those responsible for the planning and management relating to the wise use of wetlands.⁸¹ This application of the wise use principle by the Ramsar convention has a direct and immediate effect on the tourism industry. Many of the sites listed as wetlands of international importance are also considered to be important areas for nature-based tourism,⁸² partly as a result of the international status attributable to Ramsar sites.⁸³ Moreover, many countries have specific national wetland policies and strategic plans in which tourism is identified as an integral value associated with wetlands and is thus recognised as an important justification for conservation.⁸⁴ This demonstrates the important role international environmental law has in instigating and co-ordinating global policies that are then implemented on a national level to regulate and manage the activities of participants, such as those involved in the tourism industry. As such, the international responsibility placed upon state parties to adhere to the principle of wise

⁸¹ For further details see the Wise Use Resource Centre website <http://www.ramsar.org/wurc_index.htm>.

⁸² E.g. tourist 'attractions' which are also listed as Ramsar sites include the Everglades National Park, America; Loch Lomond, Scotland; Doñana National Park, Spain; and Lake Nakuru, Kenya.

⁸³ For a complete list of Ramsar sites, see the website <http://ramsar.org/key_sitelist.htm>.

⁸⁴ E.g. see the 1986 New Zealand Wetlands Management Policy; 1997 Wetlands Policy of the Commonwealth Government of Australia; 1999 Greek National Strategy for Wetland Resources; and 1999 Ghana National Wetlands Conservation Strategy. For further details on this point, see the Ramsar Wise Use Resource Library website <http://www.ramsar.org/wurc_library.htm>.

use additionally regulates tourism activities in areas recognised as important natural wetland habitats.

A second example of tourism activities being influenced by the principle of sustainable utilisation, via an international agreement, is found in the Convention on Biological Diversity.⁸⁵ The three objectives of the CBD are described as ‘the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources’, demonstrating an approach well-founded in the concept of sustainable development.⁸⁶ However, it is only upon one of the three objectives⁸⁷ – that of sustainable use – that this discussion will focus.⁸⁸

The applicability of the CBD’s provisions is relatively wide reaching, with ‘biological diversity’ defined as ‘the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part’.⁸⁹ Thus, in practice, this translates to the natural environment and its inhabitants – a primary attraction for the tourism industry. The CBD provides general measures for conservation and ‘sustainable use’, including the development of ‘national strategies, plans or programmes for the conservation and sustainable use of biological diversity’, in order to reflect the measures set

⁸⁵ See the website of the CBD <<http://www.biodiv.org/>>.

⁸⁶ CBD, article 1.

⁸⁷ The remaining two objectives of the CBD (that is, conservation and equitable sharing) are not included as the focus of the current discussion is the concept of sustainable use.

⁸⁸ The ‘sustainable use’ definition applied within the CBD is outlined above; see *supra* note 74 and accompanying text.

out in the Convention.⁹⁰ The implementation of international agreements into national policies and legislation by states has been an important achievement for both the CBD and Ramsar. It allows for specific regional issues to be addressed within the wider context of the subject area and thus, for the direct enforcement of obligations within national jurisdictions. This is of particular importance to the tourism industry, where many of the participants are companies or individuals who could otherwise potentially escape the applicability of international law obligations.⁹¹ The implementation of international commitments into domestic regimes provides an important mechanism for the regulation of tourism activities.

There is an obvious link between CBD provisions and the tourism industry. The scope of the Convention encompasses biological diversity in its widest sense, ensuring that virtually any aspect of the natural environment qualifies for inclusion.⁹² Accordingly, any tourism activity that impacts on biological diversity may be caught by the provisions of this international agreement. Notably, the Secretariat of the CBD convened a workshop on biological diversity and tourism in 2001, during which 'international guidelines for activities related to sustainable tourism development' (the CBD Tourism Guidelines) were drafted.⁹³ Whilst these Guidelines focus on vulnerable ecosystems and habitats of major importance for biological

⁸⁹ CBD, article 2.

⁹⁰ CBD, article 6(a).

⁹¹ See Chapter Two for a detailed discussion on the application of international law to the tourism industry.

⁹² CBD, article 2.

⁹³ *Workshop on Biological Diversity and Tourism, Santo Domingo, 4 to 7 June 2001. UNEP/CBD/WS-Tourism/4* (10 July 2001). Note the CBD Tourism Guidelines are still in draft form – a second consultation on the guidelines was being undertaken from September 2002.

diversity, they are intended to be applicable to tourism and biological diversity in all areas.⁹⁴

Moreover, these two Conventions have formed a formal co-operative relationship through the conclusion by the CBD and Ramsar Secretariats of a Memorandum of Co-operation.⁹⁵ This Memorandum has been supported by Resolutions made by parties to the Ramsar Convention, where the nexus between the scope and applicability of each Convention is recognised.⁹⁶ However, there has been criticism regarding the compatibility of the two initiatives to work together, with assertions that Ramsar offers a segmented, out-dated approach to conservation.⁹⁷ In rebutting this allegation, it has been suggested that the CBD could be recognised as being equally segmented due to the adoption of an ecosystem theme approach, whilst the evolutionary developments of Ramsar over the last three decades are recognised as bridging any categorical segmentation present in the original conception of the agreement. In particular it is noted that many of the subsequent subsidiary documents emerging from Ramsar conference of the parties meetings have added further substance and detail to the original vision and framework established when the Convention was drafted.⁹⁸

⁹⁴ The CBD Tourism Guidelines are discussed in greater detail in Chapter Three (3.2.1). At this point, it is simply worthwhile to note that the inescapable relationship between biodiversity and tourism has been recognised on a global level and an international legal framework is currently in the process of being concluded.

⁹⁵ Signed on 19 January 1996.

⁹⁶ See Resolution 5.1 (5th Conference of the Parties, Japan 1993) and Resolution VI.9 (6th Conference of the Parties, Australia 1996).

⁹⁷ D.Farrier and L.Tucker 'Wise Use of Wetlands Under the Ramsar Convention: a Challenge for Meaningful Implementation of International Law' 12 *Journal of Environmental Law* (2000) 21-42.

⁹⁸ B.Phillips 'Ramsar Rebuttal on Importance of the Wise Use Principle' (A review of the Farrier and Tucker article) 2001. available on the Ramsar website <http://www.ramsar.org/w.n.wise_use_article_response.htm>.

However, in any event the CBD and Ramsar both offer legitimate conservation mechanisms for the natural environment in respect of tourism, based on the sustainable utilisation principle.

The final point to be made in respect of the principle of sustainable utilisation is in relation to the assessment of an environment's carrying capacity for tourism. Also referred to as the 'absorption threshold', the carrying capacity assessment evaluates the physical, environmental and ecological capacity of a particular environment or natural resource.⁹⁹ Whilst the principle of sustainable use has been adopted both by instruments of international environmental law (as described above) and declarations within the tourism industry,¹⁰⁰ a cogent link has been established between the principle of sustainable use and the carrying capacity assessment technique. The adoption by tourism initiatives of the carrying capacity principle (as a means of evaluating the sustainability threshold) represents an industry interpretation and practical implementation of the sustainable utilisation principle found in international environmental law.¹⁰¹ The carrying capacity principle can be identified by a specific model that identifies and quantifies certain thresholds, thus effectively adopting the principle of sustainable utilisation

⁹⁹ See an earlier discussion of carrying capacity in Chapter One (1.2.1).

¹⁰⁰ E.g. 1995 Lanzarote Charter for Sustainable Tourism; 2002 Quebec Declaration on Ecotourism.

¹⁰¹ E.g. 'carrying capacity' is used in the 1989 Hague Declaration on Tourism, principles II(2)(f) and III(2)(c); 1997 Berlin Declaration on Biological Diversity and Sustainable Tourism, principle 2.9; 1999 Global Code of Ethics for Tourism, article 3(5).

and implementing it in such a way that a tangible value can be measured by tourism participants.¹⁰²

4.1.3 The Integration of Environmental Protection and Economic Development

The final substantive characteristic of sustainable tourism is that of integration. Sustainable development represents the notion of merging environmental concerns and development priorities into one concept, in order to achieve equilibrium between the interests. The principle of integration is the substantive mechanism that transforms this notion into a reality. The two principles of development and environmental protection are fundamentally an area for potential conflict within the international legal system. First, the 1986 Declaration on the Right to Development asserts that 'the right to development is an inalienable human right'¹⁰³ providing a seemingly unequivocal entitlement to the benefits of development. Secondly, the assertion of a right to environmental protection can be illustrated by references to a right to a satisfactory environment,¹⁰⁴ the improvement of environmental hygiene,¹⁰⁵ and the right to live in a healthy environment.¹⁰⁶ Accordingly, whilst both

¹⁰² For further information on carrying capacity models see S.Witt, M.Brook and P.Buckley *The Management of International Tourism* (London: Routledge, 1992) 17.

¹⁰³ 1986 Declaration on the Right to Development, article 1. The Declaration was adopted by the General Assembly resolution 41/128 of 4 December 1986 and is available on the Office of the UN High Commissioner for Human Rights website <<http://www.unhchr.ch>>.

¹⁰⁴ 1981 African Charter of Human and People's Rights, article 24; 1989 Convention on the Rights of the Child, article 24.

¹⁰⁵ 1966 International Covenant on Economic, Social and Cultural Rights, article 12(2)(b).

¹⁰⁶ 1988 Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol), article 11(1). Note that Article 11(2)

development and environment priorities can be identified as international human rights (and thus each warranting protection under international law),¹⁰⁷ the 'rights' in question potentially conflict with one another, thereby establishing a need to prioritise between them. This was illustrated in the *Gabcikovo-Nagymaros* case where the construction of a dam and diversion of the Danube river was seen to be a major developmental project for Slovakia, but neighbouring Hungary, having originally agreed to the project at the outset, voiced concern regarding potential environmental damage as a result of the project.¹⁰⁸ In his dissenting opinion, Vice-president Weeramantry recognised sustainable development as an important principle of current international law, observing the role it played in balancing the competing demands of development and environmental protection.¹⁰⁹ Thus, in achieving the objective of sustainable development, the notion of integration is applied in order to harmonise development and environmental interests.

of the Protocol also provides that 'state parties shall promote the protection, preservation and improvement of the environment'.

¹⁰⁷ P. Pevato 'A Right to Environment in International Law: Current Status and Future Outlook' 8(3) *RECIEL* (1999) 309. For a discussion on the relationship between human rights and the environment (and the 'right to environment'), see e.g. A. Boyle and M. Anderson (eds.) *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon, 1996); L. Zarsky *Human Rights and the Environment: Conflicts and Norms in a Globalising World* (London: Earthscan, 2002); F. Francioni (ed.) *Environment, Human Rights and International Trade* (Oxford: Hart, 2001); J. McClymonds 'The Human Right to a Healthy Environment: An International Legal Perspective' 37 *New York Law School Review* (1992) 583; UNHCHR and UNEP *Final Text of the Meeting of Experts on Human Rights and the Environment* (14-15 January 2002), available on the website <<http://www.unhchr.ch/environment/index.html>>.

¹⁰⁸ *Gabcikovo-Nagymaros Dam Case* ICJ Reports (1997) 7.

¹⁰⁹ Separate opinion of vice-president Weeramantry, available on the ICJ website <<http://www.icj-cij.org/>>.

Whilst recognition of the need for the integration of environment and development can be identified pre-1970,¹¹⁰ it was primarily with the convening of the 1972 Stockholm conference that the principle began to become prominent. The Stockholm Declaration encourages states to adopt 'an integrated and co-ordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve the human environment for the benefit of their population'.¹¹¹ The commitment to ensure 'compatibility' established at Stockholm has since developed into the more onerous obligation of 'integration', the significance of which is illustrated by its increasing use in international conventions¹¹² and global declarations.¹¹³ Furthermore, the Rio Declaration has provided a clear and concise explanation of the principle, stating that 'in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'.¹¹⁴

The concept of integration has a particularly interesting application in the area of European Community (EC) policy.¹¹⁵ The EC was created in 1957 for the primary purpose of establishing a common market and avoiding

¹¹⁰ E.g. 1949 UN Conference on the Conservation and Utilisation of Resources.

¹¹¹ 1972 Stockholm Declaration, principle 13.

¹¹² E.g. UNCLOS, article 4(1)(f); CBD, article 6(b); 1994 Convention to Combat Desertification, article 4(2).

¹¹³ E.g. 1982 World Charter for Nature, principle 7; Agenda 21, paragraph 8.2.

¹¹⁴ 1992 Rio Declaration, principle 4. It is worth noting that the Rio Declaration recognises the importance of integration not only between environmental protection and development, but also in relation to peace. Principle 25 of the Rio Declaration proclaims that 'Peace, development and environmental protection are interdependent and indivisible'.

¹¹⁵ For a discussion on the EC's integration of environmental matters into transport policy, see e.g. D.Smith 'The European Union's Commitment to Sustainable Development: is the

future conflicts within Europe.¹¹⁶ However, this market-driven (and consequently development-orientated) organisation has yielded somewhat, with the introduction of provisions requiring environmental protection requirements to be integrated into EC policies and activities, with a view to promoting sustainable development.¹¹⁷ It is therefore apparent that the integration principle has been an instrumental mechanism in attempting to reconcile the concepts of environment and development in the EC context and establish a harmonious relationship between the two in order to achieve sustainable development. Given the importance of this principle in the context of international environmental law more generally, it will be important to consider its implications for the tourism sector.

The Integration of Tourism and Environment Priorities

One of the most detailed applications of the integration principle can be found within the European Community.¹¹⁸ Although the integration of environmental issues into EC policy can be identified on earlier occasions,¹¹⁹ it was predominately the introduction of the 1997 Treaty of Amsterdam that explicitly integrated environmental concerns into all

Commitment Symbolic or Substantive in the Context of Transport Policy' *Colorado Journal of International Environmental Law and Policy* (2002) 275.

¹¹⁶ See the 1957 Treaty of Rome.

¹¹⁷ The 'Environment Title' was introduced to the original 1957 EEC Treaty by the Single European Act 1986 which sets out articles 130r, 130s, and 130t (article 25 SEA). Following this, the 1992 Maastricht Treaty changed the wording of the Environment Title (and the numbering - articles now 174, 175 and 176) in order to make the integration of environmental issues a requirement (rather than simply a component), which was reinforced by the 1997 Treaty of Amsterdam with the introduction of article 3c (now article 6). For an overview of environmental competence within the EC, see P.G.G. Davies *European Union Environmental Law: An Introduction to Key Selected Issues* (Aldershot: Ashgate, 2004) ch.1.

¹¹⁸ For an overview of EC law and the environment, see L. Krämer *EC Environmental Law* (London: Sweet & Maxwell, 5th edition 2003).

aspects of EC law and policy-making.¹²⁰ Specifically, the introduction of this provision into the 'general principles' of the EC Treaty – as opposed to inclusion within the environment title – adds further credibility and political weight to the principle of integration within EC law and policy.¹²¹ Note however, that issues surrounding the vagueness of 'integration' and the wide discretion afforded to EC institutions remain potential stumbling blocks for the effective implementation of the principle.

Integration of environmental issues into all major European policy areas formed one of the two core principles of the Fifth Environmental Action Programme (5th EAP).¹²² Notably the 5th EAP covers five target sectors, industry, energy, transport, agriculture, and tourism. The Action Programme highlights tourism as a 'good example of the fundamental link which exists between economic development and environment, with all the attendant benefits, tensions and potential conflicts'.¹²³ Sustainability is considered to be the objective for tourism activities, the achievement of which must be supported by the integration of development and environmental factors. The 5th EAP outlines a number of elements within

¹¹⁹ E.g. Article 130r of the 1987 Single European Act introduced Title VII, which specifically addresses the environment and introduces the principle of integration.

¹²⁰ Article 6 of the 1997 Treaty of Amsterdam reads "Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development."

¹²¹ However, there is some scepticism as to whether the action of including the integration principle into the text of the EC Treaty has in reality had any practical effect on Community law and policy. See e.g. D.Grimeaud 'The Integration of Environment Concerns into EC Policies: A Genuine Policy Development?' 9(7) *European Environmental Law Review* (2000) 207.

¹²² 'Towards Sustainability: A European Community Programme of policy and action in relation to the environment and sustainable development' (5th EC Environmental Action Programme, 1993), available on the European Commission's website <<http://europa.eu.int/comm/environment/actionpr.htm>>.

¹²³ 5th EC Environmental Action Programme, section 4.5.

integrated management strategies, which relate directly to the interaction of tourism and the environment, including controls on land use, rules on new construction, diversification of tourism, implementation and enforcement of environmental standards, and the creation of buffer zones around sensitive areas.¹²⁴ Following modifications introduced by the 1997 Treaty of Amsterdam, Environmental Action Programmes are now adopted in the form of legally binding decisions by the Council, resulting in their content becoming a source of law.¹²⁵ However, as the 5th EAP was adopted prior to the Treaty of Amsterdam its provisions lack such explicit legal authority, although its substance is likely to be considered soft law.¹²⁶ Finally, a progress report on implementation of the 5th EAP was concluded by the Commission in 1996.¹²⁷ The Report notes that the achievement of sustainable tourism objectives is dependent upon measures taken in other sectors, for example, transport, water and waste management. Whilst it is acknowledged that some progress has been made, the Report concludes that the objectives of the 5th EAP in respect of tourism have not yet been implemented and consequently, calls for priority action in a number of areas – but especially regarding integration.

Within the wider European context, the objective of environmentally sustainable tourism has been addressed by both interest-based

¹²⁴ 5th EC Environmental Action Programme, section 4.5.

¹²⁵ EC Treaty, article 175(3).

¹²⁶ Note that whilst the content of EAP's are considered to be soft law, in reality the substance is so general so as to make commitment to the provisions difficult.

¹²⁷ COM(95) 624 10.1.1996.

organisations¹²⁸ and also by the European Commission.¹²⁹ However, of particular relevance is the 1996 Tourism Protocol to the 1991 Convention on the Protection of the Alps (Alpine Convention),¹³⁰ concluded to address the issue of sustainable tourism within the European alpine environment. The Protocol recognises the particularly sensitive characteristics of the alpine ecosystem and accordingly establishes specific measures to ensure the sustainable development of mountainous regions. Mountains are an important source of water, energy and biological diversity, whilst also providing key resources such as minerals, forest and agricultural products.¹³¹ Moreover, the mountain environment has become increasingly popular for recreation and tourism purposes, especially in the European Alps. However, the fragile mountain ecosystem is susceptible to environmental degradation by way of accelerated soil erosion, landslides, and rapid loss of habitat and genetic diversity, thus threatening its intrinsic resources and the associated recreational benefits.

The stated objective of the Protocol is to contribute to the sustainable development of the Alps through tourism that respects the environment. This is to be undertaken within the existing institutional framework and should be based upon specific measures and recommendations, taking into consideration the interests of local population and tourists.¹³² The principle

¹²⁸ See Europarc Federation's 'European Charter for Sustainable Tourism in Protected Areas', available on the website <www.europarc.org>.

¹²⁹ For a list of the European Commission's official documents on tourism, see the website <http://europa.eu.int/comm/enterprise/library/lib-tourism/off_doc.htm>.

¹³⁰ The Alpine Convention (31 ILM 767) and Tourism Protocol are available on the Alps Network for Protected Areas website <<http://www.alparc.org/eng/>>. The Protocol is officially translated in the four alpine languages of French, German, Italian and Slovene.

¹³¹ Agenda 21, section II, paragraph 13.1.

¹³² 1996 Tourism Protocol (author's translation), article 1.

of integration is explicit in the Protocol, as parties must also take its objectives into consideration in other policies, particularly in areas of planning, transport, agriculture, forestry, and the protection of nature and the environment.¹³³ Furthermore, the supply of water and energy are also areas requiring the integration of sustainable tourism policies.¹³⁴ The Protocol operates by taking well-established principles (such as integration), applying them to the specific context of alpine tourism and addressing the particular characteristics of the European Alps. This Protocol represents one of the few international attempts at specifically targeting the needs and threats posed by the tourism industry in a specialised agreement.

In contrast to the specialised approach to sustainable tourism development adopted by the Tourism Protocol, the 1992 United Nations Framework Convention on Climate Change (UNFCCC) offers a broad structural agreement by which anthropogenic tourism activities contributing towards climate change may fall within the scope of the Convention. Of the numerous activities that, on the one hand, significantly contribute to climate change but, on the other, also experience a deleterious effect as a result of the changing global climate, tourism is perhaps one of the most significant candidates. The Intergovernmental Panel on Climate Change (IPCC) was established by UNEP and the WMO to 'assess scientific, technical and socio-economic information relevant for the understanding of climate change, its potential impacts and options for adaptation and

¹³³ 1996 Tourism Protocol (author's translation), article 3.

mitigation'.¹³⁵ Whilst technical details of the climate change phenomenon are complex, it is largely agreed that the main cause of the 'greenhouse effect' is anthropogenic activities, in particular the combustion of fossil fuels, agriculture, and land-use changes such as deforestation.¹³⁶ The very nature of tourism requires, as a minimum, global transportation and a reasonable level of development and infrastructure – activities that contribute to the emission of anthropogenic greenhouse gases. Nevertheless, whilst tourism can be seen to contribute towards anthropogenic climate change, it is also a victim of its own actions as the changing climate poses drastic consequences for the industry. With many tourism activities being located in fragile ecosystems such as coastal zones, islands, mountain regions and flood-prone areas, the immediate effect on tourists, the industry, and local populations dependent on tourism activities is considerable.¹³⁷ The resulting change in primary natural resources (in the form of rising sea levels, decreased snow cover, coral reef bleaching, and 'melting' ice caps) combined with the impact on secondary resources (for example where dramatic El Nino weather patterns occur), indicate the unsustainable nature of global climate change and the direct impact this is having on the tourism industry.¹³⁸

¹³⁴ 1996 Tourism Protocol (author's translation), article 3.

¹³⁵ For further information see the IPCC website <<http://www.ipcc.ch/index.html>>.

¹³⁶ The key anthropogenic greenhouse gases are carbon dioxide, methane, nitrous oxide, and tropospheric ozone. For further information see R. Watson *et al* (eds.), *Climate Change 2001: Synthesis Report* (Geneva: IPCC, 2001), available on the IPCC website <<http://www.ipcc.ch/index.html>>.

¹³⁷ The 1st International Conference on Climate Change and Tourism was convened in April 2003 by the WTO. For further details see the WTO website <<http://www.world-tourism.org/sustainable/climate/brochure.htm>>.

¹³⁸ It is acknowledged that some areas could benefit from changing weather patterns as a result of climate change. However, the climate change phenomenon is generally regarded to be problematic and thus, pose a threat to the sustainability of the overall global environment.

With so many of the anthropogenic causes of climate change attributable to development, the principle of integration is fundamental to the concept of sustainable tourism. The integration of climate considerations into relevant social, economic and environmental policies has been identified by the UNFCCC as a commitment for all parties to the Convention.¹³⁹ The close nexus between climate change activities and the tourism industry means that the integration of policies is essential in order to attempt to achieve some level of environmental sustainability. Accordingly, in defining the concept of sustainable tourism, the issue of climate change must be recognised as an integral component to be integrated into all aspects of development.

So far, the principle of sustainable tourism has been partially defined by the characteristics of equity, sustainable use, and integration. These concepts also represent the substantive components of sustainable development, collaborating to shape the concept within international law. The next section builds on these substantive characteristics by addressing certain concepts of international law that can be employed to contribute to the achievement of sustainable tourism.

4.2 Supplementary Principles Contributing to the Achievement of Sustainable Tourism

¹³⁹ UNFCCC, article 4(1)(e) and (f).

4.2.1 Achieving Sustainable Tourism by adopting the Principle of Precaution

Although the precautionary principle is one of the most frequently cited concepts within international environmental law, it is by no means the most clearly defined.¹⁴⁰ Originally stemming from the concept of *vorsorgeprinzip*, it was within German environmental legislation that the principle was first implemented during the 1970s and 1980s before subsequently appearing in the international forum.¹⁴¹

The structure of the precautionary principle is framed in the notion of scientific uncertainty regarding environmental degradation. Going further than the principle of prevention – which is implemented to prevent environmental damage where the likely circumstances of the activity is known – the precautionary principle is invoked in situations where there exists a threat to the environment, but there lacks scientific certainty to determine the specific existence, or extent, of any such environmental degradation, as a result of that activity.¹⁴² The precautionary principle¹⁴³ was articulated in the 1992 Rio Declaration, which provides that

¹⁴⁰ For a general discussion on the precautionary principle in international law see: A.Trouwborst *Evolution and Status of the Precautionary Principle in International Law* (Kluwer: Netherlands, 2002); N.De Sadeleer *Environmental Principles: From Political Slogans to Legal Rules* (Oxford: OUP, 2002) ch. 3; O.McIntyre and T.Mosedale 'The Precautionary Principle as a Norm of Customary International Law' 9(2) *JEL* (1997) 221-241; D.Freestone and E.Hey (eds.) *The Precautionary Principle and International Law: The Challenge of Implementation* (Kluwer: Netherlands, 1995); H.Hohmann *Precautionary Legal Duties and Principles of Modern International Environmental Law* (London: Graham & Trotman, 1994).

¹⁴¹ See Boehmer-Christiansen 'The Precautionary Principle in Germany – Enabling Government' in T.O'Riordan and J.Cameron (eds.) *Interpreting the Precautionary Principle* (Earthscan: London, 1994) 31-60.

¹⁴² For a general discussion on the principle of prevention, see De Sadeleer, note 140, ch. 2.

'[i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'¹⁴⁴

A brief explanation of the characteristics of the precautionary principle helps place this concept in its appropriate context. First, obligations surrounding the burden of proof. Traditionally, the burden has fallen on those promoting environmental protection to prove that certain activities being undertaken may be harmful to the environment. However, there is a growing trend to suggest that, in some situations,¹⁴⁵ the precautionary principle reverses this burden onto the party undertaking an activity, so that instead it must be established that an activity does not damage the environment, before it can proceed.¹⁴⁶ Secondly, a threshold for the

¹⁴³ Note that there has been some debate regarding the substitution of the term 'precautionary principle' with 'precautionary approach'. Whilst it has been argued that such substitution is effectively watering-down the concept from principle status (which could invoke a blanket prohibition) to a more general notion or idea (employing only precautionary management or a cautious approach), there remains a valid case for concluding that both 'principle' and 'approach' have slightly different implications warranting the differentiation in use of the term for differing situations. For a further discussion on this issue, see Birnie and Boyle, note 14, p. 115-117; and the FAO information paper 'The Precautionary Approach to Fisheries with Reference to Straddling Fish Stocks and Highly Migratory Fish Stocks' (A/CONF.164/INF/8).

¹⁴⁴ 1992 Rio Declaration, principle 15.

¹⁴⁵ Parties to the 1972 London Dumping Convention endorsed the precautionary principle in 1983 by adopting a moratorium on the dumping of low-level radioactive waste until studies were undertaken to determine the effects of radioactive waste dumping. Following these studies, parties to the Convention agreed to ban the dumping of all radioactive wastes (see Annexes I and II to the Convention). Similarly, the 1946 Whaling Convention introduced a blanket moratorium on commercial whaling in 1982, until such point that it could be established that stocks had recovered to a level where they could be sustainably harvested.

¹⁴⁶ See Cameron, Wade-Gery and Abouchar 'Precautionary Principle and Future Generations' in E. Agius and S. Busuttil (eds.) *Future Generations and International Law*

acceptable level of environmental harm must be determined for each situation. Whilst it is acknowledged that human activity will always entail some environmental impact,¹⁴⁷ there is a need for a benchmark to be established in order to determine what constitutes an acceptable level of risk or damage to the environment. However, there is no universal consensus as to the threshold level – instead each international agreement is responsible for determining the appropriate level of damage or risk acceptable for each situation.¹⁴⁸ The final point is in relation to the clean production techniques associated with the precautionary approach. In employing the principle of precaution, the method for ensuring clean production (for example, in relation to emission reduction targets) must reach the standard achievable using either the Best Available Technology (BAT) or – in some less precautionary situations – the Best Available Technology Not Entailing Excessive Costs (BATNEEC). The application of these technology standards ensures that an achievable threshold is established for clean production and precautionary emission targets.¹⁴⁹

The status of the precautionary principle within international law continues to evolve. Whilst it has been adopted in numerous international

(London: Earthscan, 1998) 108-109; De Sadeleer, note 140, p. 202-207; Freestone and Hey, note 140, p. 84-86.

¹⁴⁷ Cameron, Wade-Gery and Abouchar, note 146, p. 100.

¹⁴⁸ For example, Article 4(3)(f) of the 1991 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (30 ILM 775) specifies no requirement as to the level of damage, whilst Article 3(3) of the 1992 Climate Change Convention requires 'serious or irreversible damage' before the precautionary principle is invoked.

¹⁴⁹ Note that some authors identify the use of best available technologies with the preventative principle rather than the precautionary principle. See De Sadeleer, note 140, p. 84-86.

agreements and declarations relating to environmental protection,¹⁵⁰ the precautionary principle remains vague in definition and largely inconsistent in the degree of obligation it imposes. However, these inconsistencies may simply reflect the fact that the precautionary approach occurs along a spectrum, rather than existing as a single, unequivocal normative principle, with the result that a high threshold for harm would exist if there is to be an obligation to take precautionary action, but a lower threshold will exist if there is merely encouragement to do so. Accordingly, this variable application means that precaution currently remains an evolving principle of international law.¹⁵¹

¹⁵⁰ E.g. 1985 Convention for the Protection of the Ozone Layer, preamble; 1987 Protocol on Substances that Deplete the Ozone Layer, preamble; 1990 Bergen Ministerial Declaration on Sustainability in the ECE Region, article 7; 1992 Convention on Biological Diversity, preamble; 1992 Framework Convention on Climate Change, article 3(3).

¹⁵¹ This status has been reflected by international courts that have to-date declined to recognise the principle as a part of general international law. The evolutionary nature of the principle was recognised in the dissenting ICJ judgement of Judge Weeramantry in the 1995 *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's 1974 Judgment in the Case Concerning Nuclear Tests (New Zealand v. France)*, where he stated (at p.342) that the precautionary principle is '...a principle which is gaining increasing support as part of the international law of the environment.' However, in the *Gabcikovo-Nagymaros* case, the ICJ refused to comment on the principle despite it being relied on by Hungary, whilst the WTO Appellate Body deemed the status of the precautionary principle in general international law uncertain in the *Measures Concerning Meat and Meat Products (Beef Hormones)* case. Similarly, in the *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)* Judge Shearer for the International Tribunal for the Law of the Sea noted in his separate opinion that '...whether [the precautionary] ... principle can of itself be a mandate for action, or provide definitive answers to all questions of environmental policy, must be doubted'. The precautionary principle has been considered to be lacking international legal status by the majority of commentators, including: D.Freestone 'International Fisheries Law Since Rio: The Continued Rise of the Precautionary Principle' in A.Boyle and D.Freestone (eds.) *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: OUP, 1999); Martin-Bidou 'Le principe de precaution en droit international de l'environnement' (1999) *Revue Generale de Droit International Public* 631; J.Hickey and V.Walker 'Refining the Precautionary Principle in International Environmental Law' 14 *Virginia Environmental Law Journal* (1995) 423; Hohmann, note 140; D.Bodansky 'Scientific Uncertainty and the Precautionary Principle' 33 *Environment* (1991) 4. However, some authors support the idea that the precautionary principle has some legal effect, albeit at the very least as an evolving legal concept. See Birnie and Boyle, note 14, p. 115-121; Trouwborst, note 140; McIntyre and Mosedale, note 140; and Lowe, note 11, in respect of concepts having normative status (in this case sustainable development) even though they remain definitively vague.

A Precautionary Approach towards Tourism Activities

Although the precautionary principle has been employed in many sectors of international environmental law, it has proven especially relevant to the problem of pollution. Whilst the discharge of pollutants into the environment poses a potentially significant risk to the sustainability of the natural environment and its inhabitants – the extent (or indeed actual existence in some circumstances) of the damage remains difficult to identify and quantify. Thus, the principle of precaution has been adopted in situations where pollution may result in environmental degradation, but the actual extent of such damage remains uncertain. Whilst the nature of the tourism industry means that the environment will be subject to pollution from a vast array of tourism-related activities (such as infrastructure development, transportation, resource consumption, recreational activities), the pollution of the marine environment is particularly problematic for this sector. Thus, marine pollution will form the basis of the subsequent discussion.

The precautionary principle is used extensively in the field of marine pollution, indicating that, despite considerable data collection and research in this area, there remains significant uncertainty as to the impact of marine pollution on the environment. It is evident that tourism poses a significant environmental risk to the marine environment due to the extensive utilisation of marine resources for both tourism consumption and recreation purposes. Marine pollution includes that sourced from vessels, sea-bed

activities, dumping, land-based activities and the atmosphere,¹⁵² whilst pollutants can include anything from oil, chemicals, heavy metals and radioactive waste, to sewage, plastics, industrial waste and vessels in the process of disposal.¹⁵³ Tourism activities impact on the marine environment in a number of ways. The release of sewage (creating a potential health hazard for tourists and the natural environment when released onto beaches, lakes and rivers) and fuel from recreational vehicles (which increase toxicity levels, consequently degrading aquatic plants and wildlife), are examples of the significant threat marine pollution poses for sustainable tourism development.¹⁵⁴

Marine pollution has been the subject of a number of international soft law documents over the last two decades. In 1989 UNEP recommended governments adopt the 'principle of precautionary action as a basis of their policy with regard to the prevention and elimination of marine pollution'.¹⁵⁵ Whilst this recommendation links the idea of marine pollution with the precautionary principle concept, it adds little substantive detail as to how the relationship will function in reality. However, this operational element is addressed to a certain extent by Agenda 21, which

¹⁵² Sources of marine pollution are identified as occurring in the following proportions: vessel pollution (12%), sea-bed activities (1%), marine dumping (10%), land-based activities (44%), and atmospheric pollution (33%). See GESAMP *The State of the Marine Environment* UNEP Regional Seas Reports and Studies No.115 (1990) 88.

¹⁵³ For an overview of the law regarding marine pollution, see R.Churchill and V.Lowe 'The Law of the Sea' (Manchester: MUP, 1999 3rd edition) ch.3; Birnie and Boyle, note 14, ch. 7. The impacts of marine pollution on tourism are addressed in Freestone and Gunningham 'Towards Sustainable Tourism in the Wider Caribbean Region: Beyond Command and Control' in Weiss (ed.) *International Economic Law with a Human Face* (Kluwer: Netherlands, 1998) 357-386.

¹⁵⁴ A.Mathieson and G.Wall *Tourism: Economic, Physical and Social Impacts* (London: Longman, 1992) 103-104.

requires a 'precautionary and anticipatory rather than reactive approach' to prevent the degradation of the marine environment. Agenda 21 then proceeds to outline the manner in which such an objective may be achieved, including techniques such as the adoption of environmental impact assessments, clean production techniques, recycling, waste audits and minimisation, and the construction and/or improvement of sewage treatment facilities.¹⁵⁶ Agenda 21 offers a valuable contribution to the body of soft law regarding the precautionary principle with the devotion of an entire chapter to the protection of the oceans and their natural resources, much of which is applicable to tourism activities.¹⁵⁷ Finally, the precautionary principle has been further employed by the declarations concluded as a result of the five International Conferences on the Protection of the North Sea.¹⁵⁸ What began as a relatively general reference to the precautionary principle in the first Ministerial Declaration of 1984,¹⁵⁹ develops into a more precise description of the specific actions required in order to achieve this objective in the 1995 and 2002 Declarations.¹⁶⁰ These international soft law instruments are applicable to the tourism industry in the global context by virtue of Agenda 21 and also in respect of regional tourism development activities in the North Sea

¹⁵⁵ 1989 UNEP Governing Council Decision 15/27 on the Precautionary Approach to Marine Pollution.

¹⁵⁶ Agenda 21, chapter 17.21.

¹⁵⁷ Agenda 21, chapter 17.

¹⁵⁸ 1984 Bremen Ministerial Declaration of the International Conference on the Protection of the North Sea, the 1987 London Declaration, the 1990 Hague Declaration, the 1995 Esbjerg Declaration, and the 2002 Bergen Declaration.

¹⁵⁹ Paragraph A7 recognises that damage to the marine environment can be irreversible (or remediable at considerable expense and over a long period of time) and as such coastal states and the EEC must not wait for proof of harmful effects before taking action.

¹⁶⁰ The 1995 Esbjerg Declaration calls for the continuous reduction of discharges, emissions, and losses of hazardous substances with a view to the cessation of marine pollution in the North Sea within 25 years. The 2002 Bergen Declaration employs the

region. However, the non-binding nature of these instruments allows for further regulation and management in the form of multilateral treaties, the most relevant of which are the Law of the Sea Convention and the Regional Seas Programme.

The regulation of marine pollution is undertaken at both global and regional levels. The 1982 UN Convention on the Law of the Sea (UNCLOS) establishes a global framework for the marine environment in the context of public international law, but leaves the formulation and elaboration of 'international rules, standards and recommended practices ... for the protection and preservation of the marine environment' to be concluded at the regional level.¹⁶¹ This allows for the establishment of regional management programmes and the consideration of specific regional characteristics. Developed as part of the UNEP Regional Seas Programme,¹⁶² the 1976 Convention for the Protection of the Mediterranean Sea against Pollution (the Barcelona Convention)¹⁶³ provides a comprehensive and co-ordinated approach to the protection of the Mediterranean marine environment. In a closed sea environment such as the Mediterranean – which is the focus of tourism activities on a significant scale – the Convention obliges participating states to apply the

precautionary principle for the purposes of controlling the release of genetically modified organisms, conserving species and their habitats, and managing fish stocks.

¹⁶¹ UNCLOS, article 197.

¹⁶² The UNEP Regional Seas Programme was established in the 1970s as a global mechanism to facilitate the implementation of regional initiatives for the protection and enhancement of the marine and coastal environment. For a general discussion on the Regional Seas Programme, see Akiwumi and Melvasalo 'UNEP's Regional Seas Programme: Approach, Experience and Future Plans' 22(3) *Marine Policy* (1998) 229-234, and the UNEP Regional Seas website <<http://www.unep.ch/seas/rshome.html>>.

¹⁶³ As revised by the 1995 Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (not yet in force).

precautionary principle in order to 'protect the environment and contribute to the sustainable development of the Mediterranean Sea Area'.¹⁶⁴ In addition to the Barcelona Convention there have been a number of protocols subsequently adopted for the region, including the 1980 Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities (LBS Protocol).¹⁶⁵ In similarly employing the precautionary principle, the Protocol requires states to 'eliminate pollution deriving from land-based sources and activities' by implementing national and regional action plans and programmes.¹⁶⁶ In particular, states are required to 'phase out inputs of the substances that are toxic, persistent and liable to bioaccumulate', whilst targeting 30 key sectors of activity – one of which is tourism.¹⁶⁷ In recognising tourism as a potential source of pollution in the Mediterranean marine environment, the Barcelona Convention and the LBS Protocol have harnessed the precautionary principle as a means of preventing and eliminating pollution in this environment.

¹⁶⁴ 1976 Barcelona Convention, article 4(3)(a). It is worth noting however, that this obligation on states is weakened by the inclusion of the proviso 'in accordance with their capabilities'.

¹⁶⁵ As amended by the 1996 Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities. Other Protocols to the Barcelona Convention are the 1976 Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft, the 1976 Protocol Concerning Cooperation in Combating Pollution of the Mediterranean Sea by Oil and other Harmful Substances in Cases of Emergency, the 1982 Protocol Concerning Mediterranean Specially Protected Areas, the 1994 Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil, and the 1996 Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal. See the UNEP Regional Seas website <<http://www.unep.ch/seas/rshome.html>>.

¹⁶⁶ 1980 LBS Protocol, article 5(1) and (2). Note that under Article 4(1)(b) the 1996 amendment extended the Protocol's scope to include land-based pollution transported to the marine environment via the atmosphere.

¹⁶⁷ Article 5(1) and Annex I, 1980 LBS Protocol.

Finally, operating outside of the UNEP Regional Seas Programme are a further two regional marine protection regimes – namely the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention),¹⁶⁸ and the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention). Both these agreements similarly employ the precautionary principle as a management technique for preventing pollution and ensuring the sustainable development of the local marine environment.¹⁶⁹ Evidently, the precautionary principle is seen to be a valuable tool for the achievement of the sustainable tourism objective.

4.2.2 Sustainable Tourism by Ensuring the 'Polluter Pays'

The principle that the polluter should bear the costs of pollution is an integral component of the sustainable tourism objective. Operating essentially as an economic policy, the polluter-pays principle aims to internalise environmental costs, discourage polluting activities, and promote the development and implementation of clean technologies.¹⁷⁰ The principle was first adopted by Organisation for Economic Cooperation and Development (OECD) Recommendations in the 1970s, where it is endorsed as a guiding principle concerning the international economic

¹⁶⁸ 32 ILM 1068. See the website <<http://www.ospar.org/>>.

¹⁶⁹ See the 1992 OSPAR Convention, article 2(2)(a) and the 1992 Helsinki Convention, article 3(2).

¹⁷⁰ For a general discussion on the polluter-pays principle and international law see: De Sadeleer, note 140, ch. 1; Birnie and Boyle, note 14, p. 92-95; H.Simets 'The Polluter Pays Principle in the Early 1990s' in L.Campiglio *et al* (eds.) *The Environment After Rio: International Law and Economics* (London: Graham & Trotman, 1994).

aspects of environmental policies.¹⁷¹ Specifically, it was concluded that the principle should be used for 'allocating the costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment' – the implications being that pollution costs should be reflected in the cost of goods and services which cause pollution in production and/or consumption.¹⁷² Moreover, the OECD Council recommends that member countries 'should not assist the polluters in bearing the costs of pollution control whether by means of subsidies, tax advantages or other measures'.¹⁷³

The polluter-pays principle was more recently implemented by the 1992 Rio Declaration in the broader context of sustainable development. In advocating the internalisation of environmental costs and the use of economic instruments, the Declaration adopted the approach that 'the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment'.¹⁷⁴ The polluter-pays principle can be applied in different ways. First, environmental liability may be imposed, whereby polluters are liable for environmental damage resulting from their activities.¹⁷⁵ The

¹⁷¹ OECD Recommendations C(72)128 on Guiding Principles concerning International Economic Aspects of Environmental Policies, 1972; C(74)223 on the Implementation of the Polluter-Pays Principle, 1974; C(89)88 concerning the Application of the Polluter-Pays Principle to Accidental Pollution, 1989; and C(90)177 on the Use of Economic Instruments in Environmental Policy, 1991.

¹⁷² OECD Recommendation C(72)128, paragraph A(4).

¹⁷³ OECD Recommendation C(89)88, paragraph 3.

¹⁷⁴ 1992 Rio Declaration, principle 16.

¹⁷⁵ Environmental liability is one method of ensuring the 'polluter pays' for environmental damage. However, this discussion will focus on an alternative method, that of environmental taxation. For a discussion on the concept of environmental liability see e.g.

polluter pays principle can operate (as a principle of sustainable tourism) as part of either a strict, or negligence-based regime. Whilst a strict liability approach appears *prima facie* the most effective approach for the achievement of sustainable tourism, the absence of any requirement of proving negligence produces implementation and compliance difficulties based upon its potentially wide application to polluting activities and to loss which falls outside the traditionally accepted categories of recoverable damage (e.g., 'pure ecological damage').¹⁷⁶ A second way in which the polluter pays principle can be employed is by way of environmental charges – or environmental taxation – where those responsible for polluting activities are taxed in order to finance public policy for environmental protection.¹⁷⁷ However, this approach can be problematic owing to difficulties in the identification of the appropriate polluter. Issues such as when the pollution is deemed to occur (is it when emission standards are exceeded or when there is an environmental impact?), the identification of the polluter (the manufacturer, the retailer, or the consumer), and the amount the polluter should be liable to pay, all contribute to implementation difficulties of the polluter-pays principle.¹⁷⁸ The invocation of the principle to date suggests that pollution transpires when environmental damage occurs,¹⁷⁹ however, the identification of the specific

M.Bowman and A.Boyle (eds.) *Environmental Damage in International and Comparative Law: Problems of Definition and Valuation* (Oxford: OUP, 2002); L.Bergkamp (ed.) *Liability and Environment: Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context* (Netherlands: Kluwer, 2001).

¹⁷⁶ De Sadeleer, note 140, p. 49-59.

¹⁷⁷ For an overview of environmental taxation see De Sadeleer, note 140, p. 44-49;

O.K.Fauchald *Environmental Taxes and Trade Discrimination* (London: Kluwer, 1998).

¹⁷⁸ De Sadeleer, note 140, p. 38-44.

¹⁷⁹ E.g. Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution, article 2; 1979 LRTAP Convention, article 1(a); 1982 UNCLOS, article 1(1)(4); 1992 OSPAR Convention, article 1(d).

polluter and the extent of its liability both remain ambiguous. Finally, the EU has more recently adopted a 'producer responsibility' approach in its regulation as a means of implementing the polluter-pays principle. In the case of end-of-life vehicles and waste electrical and electronic equipment in particular, responsibility is directed towards the producers for taking back and recycling products as a way of encouraging producers to take responsibility for pollution costs and, furthermore, design products in a more environmentally beneficial and efficient manner.¹⁸⁰

Despite reference to the polluter-pays principle being commonplace in environmental agreements for a number of decades, its legal status remains uncertain. The principle has been widely utilised in regional-based treaties,¹⁸¹ though difficulties in establishing economic obligations in respect of the environment has meant that a universally accepted interpretation has yet to be agreed. With the exception of the OECD and EC context – where the principle has been applied with sufficient operative detail and consistency – it is unlikely that the polluter-pays principle constitutes a general principle of customary international law.¹⁸²

¹⁸⁰ See the EC Directives 2000/53/EC on End-of-Life Vehicles and 2002/96/EC on Waste Electrical and Electronic Equipment (WEEE), available on the website of the European Union at <http://europa.eu.int/comm/environment/waste/waste_topics.htm>. For an overview of the polluter-pays principle in European Union law, see P.G.G.Davies *European Union Environmental Law: An Introduction to Key Selected Issues* (Aldershot: Ashgate, 2004) 52-55.

¹⁸¹ See 1985 ASEAN Convention, article 10(d); 1991 Convention on the Protection of the Alps, article 2(1); 1992 UN/ECE Transboundary Watercourses Convention, article 2(5)(b); 1992 OSPAR Convention, article 2(2)(b); Convention on the Protection of the Marine Environment of the Baltic Sea Area, article 3(4).

¹⁸² Most authors agree that the polluter pays principle lacks sufficient detail to have legal effect. See e.g. Birnie and Boyle, note 14, p. 92-95; Sands, note 11, p. 279-285; Smets, note 170. Note however, that the polluter-pays principle has been described as a 'general principle of international environmental law' in Preambles to the 1990 Oil Pollution Preparedness and Response Convention and the 1992 Convention on the Transboundary Effects of Industrial Accidents.

Cost Internalisation as a means of ensuring Sustainable Tourism Development

The development of tourism infrastructure (such as airports and hotel complexes) and the on-going management of tourism activities (for example, golf courses, seaside recreation activities, and skifields) has the potential to create a significant level of pollution, and consequently, have detrimental effects on the natural environment. One approach which demonstrates potential for successfully addressing this problem is the internalisation of environmental costs. The economic principle of cost internalisation has been utilised in a variety of contexts,¹⁸³ including with respect to achieving sustainable tourism.¹⁸⁴ This approach is particularly relevant to an industry composed primarily of private-sector investors and individuals undertaking defined activities from which there is a corresponding environmental impact. In its endorsement of the polluter-pays principle, the OECD requires the polluter to bear the associated pollution costs in order to 'ensure that the environment is in an acceptable state'.¹⁸⁵ Subsequently, as a result of environmental threats posed by tourism development, the internalisation of costs by applying the 'user-pays' and the 'polluter-pays' concepts present a means by which

¹⁸³ E.g. the internalisation of environmental costs in the transport sector, in M.Humphreys 'The Polluter Pays Principle in Transport Policy' 26(5) *European Law Review* (2001) 451.

¹⁸⁴ For an overview of cost internalisation in the tourism sector, see D.Freestone and N.Gunningham 'Towards Sustainable Tourism in the Wider Caribbean Region: Beyond Command and Control' in E.Weiss *et al* (eds.) *International Economic Law with a Human Face* (Kluwer: Netherlands, 1998).

¹⁸⁵ Paragraph 4, OECD Recommendations C(72)128 on Guiding Principles concerning International Economic Aspects of Environmental Policies, 1972. For an overview of economic instruments targeting pollution control in the OECD region see, 'Economic

environmental taxes and levies may be introduced to curb and prevent tourism-generated environmental damage.

The adoption of the *user-pays* approach by the tourism industry has proven to be a useful mechanism for ensuring those receiving benefits from particular tourism resources contribute to the maintenance and upkeep of the same natural resources. The user-pays concept is implemented most commonly by the imposition of charges, levies and user fees in relation to the utilisation or consumption of natural resources. One example is the 'Environmental Management Charge' introduced in Australia's Great Barrier Reef Marine Park, where tourist operators are subject to charges based on the number of visitors to undertake tourist programmes within the Park. The funds collected by the programme are used by the Great Barrier Reef Marine Park Authority (GBMPA) for research, education and Marine Park management, with a large proportion of funds being allocated to the Cooperative Research Centre for the Ecologically Sustainable Development of the Great Barrier Reef.¹⁸⁶ By imposing a user-fee for activities impacting on specific natural resources, tourism management authorities can subsequently apply the collected funds back into the management, maintenance, and research of the natural resources in order to ensure the tourism activities are undertaken in a sustainable manner.

Instruments for Pollution Control and Natural Resources Management in OECD Countries: A Survey' (1999) OECD doc. ENV/EPOC/GEEI(98)35/REV1/FINAL.

¹⁸⁶ For further details on this project, see the GBMPA website <<http://www.gbrmpa.gov.au/>>.

Next, the application of the *polluter-pays* principle to the tourism sector offers an economic method for targeting pollution control. Emissions to the air, land and sea are common consequences of tourism activities and, as such, a method of restricting and reducing both the type of pollutants, and the source of pollution, is of fundamental importance. The imposition of product charges on specific pollutants has the effect of establishing a higher purchase price, thereby requiring the polluter (in this case, the purchaser and presumably the consumer of the pollutant) to pay an increased price for the benefit of using polluting substances.¹⁸⁷ Perhaps the most common example of the *polluter-pays* principle within the tourism industry is the imposition of levies on aircraft flights, thereby passing on the cost of pollution (and the associated development and research costs for new technologies) to the consumer.¹⁸⁸ Similarly, emission charges have proven to be an effective policy instrument for requiring the polluter to take financial responsibility for the release of pollution into the environment.¹⁸⁹

The application of the cost internalisation principle to the global tourism industry does have some repercussions for international trade and in particular, the reconciliation of trade and environment interests under the General Agreement on Tariffs and Trade (GATT) regime.¹⁹⁰ The

¹⁸⁷ This can be demonstrated by environmental charges attached to products such as motor fuel, pesticides and fertilisers, batteries, ozone depleting chemicals, and packaging.

¹⁸⁸ N. Watt 'All Planes – Freight and Passenger – Should Pay Green Tax, Says Lib Dems' *The Guardian* (1 March 2004).

¹⁸⁹ Emission charges have been used in respect of air pollution, municipal waste collection, water effluent, users of wastewater, and aircraft noise.

¹⁹⁰ For a discussion on the *polluter-pays* principle and international trade, see e.g. S. Charnovitz 'Free Trade, Fair Trade, Green Trade: Defogging the Debate' 27 *Cornell International Law Journal* (1994) 459; C. Pearson 'Testing the System: GATT + PPP = ?'

economic principle of polluter-pays is one of the fundamental concepts addressing policy differences between trade and the environment.¹⁹¹ Despite suggestions that the principle's characteristics of economic efficiency and the operation of free markets would be conducive to the promotion of international trade,¹⁹² neither the World Trade Organisation nor the GATT has yet adopted the polluter-pays principle as a compulsory mechanism for trade and environment inconsistencies. In particular, the World Trade Organisation dispute panel concluded that 'the General Agreement's rules on tax adjustment ... give the contracting party the possibility to follow the polluter-pays principle, but they do not oblige it to do so.'¹⁹³

In recognition of the two competing interests, the World Trade Organisation established the Committee on Trade and Environment (CTE) in an attempt to reconcile sustainable development, trade and environment issues.¹⁹⁴ Moreover, in 2001 the World Trade Organisation held a symposium on tourism services, the purpose of which was to evaluate current developments in international tourism and assess a proposal to add

27 *Cornell International Law Journal* (1994) 553; C.Stevens 'Interpreting the Polluter Pays Principle in the Trade and Environment Context' 27 *Cornell International Law Journal* (1994) 577.

¹⁹¹ For an introduction into the issues surrounding international trade and environmental protection, see e.g. T.Schoenbaum 'International Trade and Protection of the Environment: the Continuing Search for Reconciliation' 91 *AJIL* (1997) 268.

¹⁹² Schoenbaum, *ibid.*, p. 296.

¹⁹³ United States – Taxes on Petroleum and Certain Imported Substances, 17 June 1987 GATT B.I.S.D. (34th Supp.) 136, paragraph 5.1.9 (1988) (the *US Superfund* case).

¹⁹⁴ See the World Trade Organisation website
<http://www.wto.org/english/tratop_e/envir_e/envir_e.htm>.

a tourism annex to the General Agreement on Trade in Services (GATS).¹⁹⁵ Tourism services¹⁹⁶ have been included in the new services negotiations¹⁹⁷ and commitments have been made by more member states than in any other services sector in respect of tourism services. This serves to illustrate the importance attached by both the World Trade Organisation, and its member states, to the international tourism industry and the impact this sector has on global economic policies.

4.2.3 Employing the Principle of Cooperation for the Achievement of Sustainable Tourism

The idea of international cooperation is fundamental to the United Nations Charter where the principle of 'good-neighbourliness' encourages countries to consider the interests and well-being of other states in respect of social, economic, and commercial matters.¹⁹⁸ Following the recognition of cooperation as a principle within international law, it was a logical transition for cooperation to be subsequently transferred and implemented within the environmental context.¹⁹⁹ The integration of the principle of

¹⁹⁵ The three countries were the Dominican Republic, El Salvador and Honduras. For further information on the symposium see the website <http://www.wto.org/english/tratop_e/serv_e/symp_tourism_serv_feb01_e.htm>.

¹⁹⁶ The tourism sector includes services provided by hotels and restaurants (including catering), travel agencies and tour operator services, tourist guide services and other related services.

¹⁹⁷ The new negotiations on trade in services began in 2000. For further information on the negotiations see the website <http://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm>.

¹⁹⁸ 1945 UN Charter, article 74. Also see the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations.

¹⁹⁹ For an introduction to the principle of international cooperation and good neighbourliness see: T.Stoll 'The International Environmental Law of Cooperation' in R.Wolfrum (ed.) *Enforcing Environmental Standards: Economic Mechanisms as Viable*

cooperation with environmental protection was recognised in the 1972 Stockholm Declaration, which proclaims that 'international matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing'.²⁰⁰ Moreover, the Declaration advises that cooperation should be undertaken by way of multilateral or bilateral arrangements in order to effectively control, prevent and eliminate adverse environmental effects.²⁰¹ The 1992 Rio Declaration further develops the relationship between cooperation and the environment, by adopting the principle to assist in the achievement of sustainable development. Included in eight of the 27 principles within the Rio Declaration,²⁰² international cooperation is recognised as a fundamental principle for achievement of the broader sustainable development objective, and therefore, sustainable tourism.

The principle of cooperation can be realised using a number of different methods, depending upon the specific requirements contained in the relevant agreement.²⁰³ The most frequently asserted forms of cooperation include those relating to legal, administrative and political cooperation,²⁰⁴

Means? (Berlin: Springer, 1996); Sands, note 11, p. 249-251; Birnie and Boyle, note 14, p. 126.

²⁰⁰ 1972 Stockholm Declaration, principle 24.

²⁰¹ *Ibid.*

²⁰² The Rio Declaration calls on states to cooperate in respect of: eradicating poverty (Principle 5); conserving, protecting and restoring the Earth's ecosystem in accordance with common but differentiated responsibilities (Principle 7); exchanging scientific and technological knowledge (Principle 9); economic growth (Principle 12); establishing law regarding liability and compensation (Principle 13); preventing the transfer of activities or substances causing environmental degradation (Principle 14); international armed conflict law (Principle 24); and further developing international law in the field of sustainable development (Principle 27).

²⁰³ For a discussion on the elements of cooperation in environmental matters, see Stoll, note 199, p. 64-81.

²⁰⁴ E.g., Articles 13 to 19 of the 1979 Convention on Long-Range Transboundary Air Pollution and its eight protocols (legal); 1997 Convention on the Law of the Non-

information exchange,²⁰⁵ scientific and technical capacity,²⁰⁶ technology transfer,²⁰⁷ and financial mechanisms.²⁰⁸ Moreover, the notion of international cooperation between states has proven to be particularly relevant in the transboundary context. Notably, cooperation regarding shared natural resources,²⁰⁹ prior consultation,²¹⁰ and the prevention of transboundary harm²¹¹ has been expounded in some detail in decisions of international courts and tribunals. In light of these judicial decisions and the proliferation of cooperation requirements in international environmental agreements,²¹² the principle of cooperation and good-neighbourliness has now reached customary law status, whereby states now have a duty to cooperate.

Cooperating for Sustainable Tourism Development

Much of the cooperation required throughout international environmental law is in respect of the relationship between states. Evident at both

navigational Uses of International Watercourses (administrative); article 16 of the 1985 ASEAN Agreement on the Conservation on Nature and Natural Resources (political).

²⁰⁵ E.g. 1994 UN Convention to Combat Desertification, article 16.

²⁰⁶ E.g. 1992 Framework Convention on Climate Change, article 9.

²⁰⁷ E.g. 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, article 10A.

²⁰⁸ E.g. 1992 Convention on Biological Diversity, article 21. Also see the Global Environment Facility (GEF) website at <<http://www.gefweb.org/>>.

²⁰⁹ See the *Case Concerning the Gabčíkovo-Nagymaros Project*, ICJ Reports (1997) and the *North Sea Continental Shelf Cases*, ICJ Reports (1969).

²¹⁰ See the *Lac Lanoux Arbitration* 24 ILR (1957) 101 at 119.

²¹¹ See the *Trail Smelter Arbitration* 33 AJIL (1939) 182 and 35 AJIL (1941) 684 and the *Gut Dam Arbitration* 8 ILM (1969) 118.

²¹² The principle of cooperation has been included in virtually all contemporary international environmental treaties. In particular, the application of the principle is evident in the: 2003 Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context; 2003 Protocol on Pollutant Release and Transfer Registers to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters; 2002 ASEAN Agreement on Transboundary Haze Pollution; 2001 Stockholm Convention on Persistent Organic Pollutants; 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity; and the 1999 Protocol to Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

international and regional levels, these obligations require states to cooperate in order to achieve a common environmental goal. The plethora of environmental concerns associated with the tourism industry mean that cooperation is an integral aspect of achieving sustainable tourism, as can be demonstrated by cooperation-based programmes between states such as the Mediterranean action plan and the agreement on the European alpine environment.²¹³ The principle of cooperation has more recently also been harnessed by international organisations as a means of co-ordinating and facilitating state action, in addition to independently addressing environmental concerns. Whilst many international organisations undertake such a role, it is the initiatives established as part of North American Free Trade Agreement that will be explored.

The 1993 North American Agreement on Environmental Cooperation (NAAEC)²¹⁴ was concluded as a side agreement to the 1992 North American Free Trade Agreement (NAFTA),²¹⁵ between the governments of Canada, the United States of America and the United Mexican States.²¹⁶

²¹³ Germany, France, Italy, Slovenia, Switzerland, Austria and Liechtenstein cooperate under the 1991 Convention on the Protection of the Alps to preserve and protect the European alpine environment, whilst the Mediterranean Action Plan (operating under the 1976 Barcelona Convention) protects the shared marine environment by co-ordinating the 21 countries bordering the Mediterranean Sea.

²¹⁴ 32 *ILM* (1993) 1480.

²¹⁵ 32 *ILM* (1993) 289 and 32 *ILM* (1993) 605.

²¹⁶ For a discussion on the operation and relationship between NAFTA and the NAAEC see e.g. M.Fitzmaurice 'Public Participation in the North American Agreement on Environmental Cooperation' 52 *ICLQ* (2003) 333-368; I.Moreno, J.Rubin, R.Smith III, and T.Yang 'Free Trade and the Environment: the NAFTA, the NAAEC, and Implications for the Future' 12 *Tulane Environmental Law Journal* (1999) 405; J.DiMento and P.Doughman 'Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented' 10 *Georgetown International Environmental Law Review* (1998) 651.

Whilst some references are made to the environment in the NAFTA,²¹⁷ its primary objective is the establishment of a free trade area between the three parties. Thus, in an attempt to address the relationship between trade and environment, the NAAEC was adopted to promote the environmental goals of the NAFTA accord. The general objectives of the NAAEC employ the principle of cooperation to promote sustainable development, to conserve, protect and enhance the environment, and to strengthen environmental laws, regulations, procedures, policies and practices.²¹⁸ In addition, parties to the NAAEC are obliged to cooperate to ensure the successful operation of the Agreement and provide information and notification of any relevant environmental measures.²¹⁹

*Of particular relevance, the Agreement establishes the Commission for Environmental Cooperation (CEC) to facilitate cooperation between the parties, address trade and environment issues, and oversee the implementation of the Agreement.*²²⁰ Operating as an international organisation, the CEC manages a number of programs and initiatives as part of its mandate under the NAAEC. Notably, the CEC has established a sustainable tourism initiative as part of its 'Environment, Economy and Trade' programme in order to coordinate and promote sustainable tourism practices in North America's natural areas. Following a workshop for key

²¹⁷ E.g. the preamble calls for the promotion of sustainable development, the enforcement of environmental laws, and consistency with environment protection and conservation, whilst article 104 details the relationship between NAFTA and environment and conservation agreements.

²¹⁸ NAAEC, articles 1(b),(c) and (f).

²¹⁹ NAAEC, article 20.

²²⁰ NAAEC, articles 8 to 19. The Commission is comprised of a Council, a Secretariat, and a Joint Public Advisory Committee. See the Commission website <<http://www.cec.org/>>.

stakeholders from the three countries in 1999,²²¹ the CEC concluded a paper outlining the central issues raised at the workshop and detailing possible approaches to sustainable tourism development in North America.²²² As a result of the cooperative research and negotiations undertaken by the CEC as part of this initiative, a sustainable tourism resource database and accompanying compendia of best practices has been established for North America.²²³ This collaborative effort explores guidelines and principles for sustainable tourism, opting for the identification of and adherence to sustainability criteria and indicators, rather than the establishment of a definitive sustainable tourism standard to be applied universally.²²⁴

The framework established by the NAFTA and NAAEC regimes creates a foundation from which Canada, the United States and Mexico can cooperate in respect of environmental protection and sustainable tourism. The effectiveness of this structure has recently been tested with the invocation of the NAAEC enforcement mechanism in the Cozumel Reef Case²²⁵ where it was alleged that Mexico was failing to effectively enforce its environmental laws by allowing the construction of a new cruise ship

²²¹ The workshop 'A Dialogue on Sustainable Tourism in Natural Areas in North America' was convened by the CEC from the 27-28 May 1999 at Playa del Carmen, Mexico.

²²² CEC Secretariat *Promoting Sustainable Tourism in North America's Natural Areas: the Steps Forward* (CEC: Montreal, 2000), available on the CEC website <http://www.cec.org/files/pdf/ECONOMY/sustaine_EN.pdf>. Also see the discussion paper for the workshop at <http://www.cec.org/files/pdf/ECONOMY/ecotur-e_EN.pdf>.

²²³ See the CEC Sustainable Tourism Resource Database on the website <<http://www.cec.org/databases/>> and the CEC publication 'From Principle to Practice: Compendia of *In Situ* Sustainable Tourism in North America' at <http://www.cec.org/files/pdf/ECONOMY/tourism-8e2_EN.pdf>.

²²⁴ CEC, note 222, p. 7.

pier near the coral reefs of Cozumel. The NAAEC requires each state party to effectively enforce its environmental laws and, as such, provision is made within the agreement for citizens (including NGOs) to make submissions to the CEC when a party is acting in contravention of this requirement.²²⁶ Where the CEC considers it necessary, it may develop a factual record in order to further investigate and summarise the information outlined in the submission.²²⁷ However, despite the NAAEC establishing a legal regime in North America whereby citizens and state parties²²⁸ can request the CEC to take action in order to enforce the environmental law provisions, there has been minimal employment of these enforcement mechanisms to date.²²⁹ On the one hand, the Cozumel Reef case may be considered a success in that it was the first citizen action brought under the NAAEC that resulted in the CEC issuing a factual report suggesting that Mexico was violating North American environmental law. On the other, however, the case could equally be considered a failure as the process had no legal effect and did not prevent the eventual construction of the pier. Accordingly, whilst the NAAEC and the associated environmental laws of the state parties have established a sound legal framework to govern the substantive aspects of environmental protection in North America (which

²²⁵ For a detailed account of the case see, P. Kibel 'The Paper Tiger Awakens: North American Environmental Law after the Cozumel Reef Case' 39 *Columbia Journal of Transnational Law* (2001) 395.

²²⁶ NAAEC, article 14.

²²⁷ NAAEC, article 15. For an overview of the process of citizen submissions for enforcement matters, see CEC *Bringing the Facts to Light: A Guide to Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (CEC: Montreal, 2000) – also available at the website <<http://www.cec.org/files/PDF/SEM/BringingFacts.pdf>>.

²²⁸ Note that under Article 24 of NAAEC, a party to the Agreement may request the CEC to establish an arbitral panel to determine certain breaches of the Agreement. The provision has not yet been employed by any of the parties to the Agreement.

²²⁹ Of the 44 submissions on enforcement matters filed since 1995, only nine factual records have been completed by the CEC (as at August 2004).

applies freely to activities in the tourism sector), the on-going problems with enforcement may well diminish the significance of the regime within international law.

As a final note on the cooperative situation in North America, it is apparent that the principle of cooperation has been employed by the CEC on two levels. First, the operation of the Commission as an international organisation implicitly requires cooperative action on behalf of the state parties through the operating bodies of the organisation (the Council, the Secretariat, and the Joint Public Advisory Committee), together with interaction from the public and other associated organisations and NGOs. Secondly, the principle of cooperation is fundamental to the management strategy adopted by the CEC in respect of sustainable tourism practice in North America. In endorsing the use of guidelines and criteria for achieving sustainable tourism, the Commission promotes the implementation of environmental codes²³⁰ and accreditation programmes,²³¹ the use of which is becoming increasingly wide-spread throughout the tourism industry on both a global and regional scale. The Green Globe 21 initiative²³² is an example of a third party accreditation programme endorsed by the CEC that is currently impacting on the tourism

²³⁰ The Sustainable Tourism Database lists codes of conduct for tourism activities including: diving, snorkelling, mountaineering, skiing, whale watching and wildlife viewing. For further details see the Database on the website <<http://www.cec.org/databases/>>.

²³¹ The Database also includes a number of certification programmes such as: Ecotel, Green Globe 21, Green Leaf, Green Seal, Green Hotels Association, and the International Youth Hostel Federation. Note that most certification programmes operate in respect of accommodation facilities. For further details see the Database at <<http://www.cec.org/databases/>>.

sector. Operating as a global certification programme and based on the principles founded in Agenda 21 and the 1992 Rio Declaration, Green Globe 21 aims at achieving sustainable travel and tourism for all stakeholders concerned. There are different certification standards under the programme which may be achieved following an independent audit and satisfaction of the requisite sustainability benchmarks.²³² Ongoing assessments are carried out in subsequent years to ensure that those tourism businesses awarded the Green Globe 21 certification either maintain or improve their sustainable tourism status. Whilst this initiative is an independent, self-sufficient programme, the benefits gained by the cooperative arrangement and endorsement of the Commission, together with the parties to the NAAEC, improves the implementation and potential for success in ensuring sustainable tourism.

The concepts of precaution, polluter-pays, and cooperation are all intrinsically valuable in the achievement of sustainable tourism. Being widely employed in many aspects of international law, these concepts support the substantive characteristics of equity, sustainable use, and integration described above in providing for a coherent and definitive understanding of sustainable tourism. The third and final part of this analysis relates to the procedural techniques responsible for practical

²³² Green Globe 21 operates as an independent entity financed by annual fees made by certified operations. See the Green Globe 21 website at <http://www.greenglobe21.com/>.

²³³ There are four Green Globe 21 standards, namely, the Company standard, the standard for Communities, the International Ecotourism standard, and the Design and Construct standard. The Company standard is available to tourism operations in a number of sectors including: accommodation, airlines, airports, car hire, cruise boats, golf courses, resorts, restaurants, tour operators, vineyards, and visitor centres.

implementation. Identified as specific actions within the international legal system, environmental impact assessment and public participation are the two procedural elements discussed next.

4.3 Procedural Techniques for the Implementation of Sustainable Tourism

4.3.1 Environmental Impact Assessment: A Process for Achieving Sustainable Tourism

The fundamental ideas behind environmental impact assessment (EIA) have been in existence for some time, but it is only in more recent years that the concept has gained international support and become recognised as an independent principle.²³⁴ In general terms, EIA is understood to be a process undertaken as part of a development project, in order to evaluate its potential impacts – the outcome of which is then subsequently used to assist decision-making. The functions of an EIA report have been described as providing information on the environmental consequences of proposed activities, requiring decisions to be influenced by the EIA

²³⁴ The first use of the EIA principle is attributed to sections 4321-47 of the 1969 US National Environmental Policy Act, 42 USC. For a general discussion on the development of EIA, see e.g. N.Robinson 'International Trends in Environmental Impact Assessment' 19 *Boston College Environmental Affairs law Review* (1991) 591; K.Gray 'International Environmental Impact Assessment: Potential for a Multilateral Environmental Agreement' 11 *Colorado Journal of International Environmental Law and Policy* (2000) 83; J.Knox 'The Myth and Reality of Transboundary Environmental Impact Assessment' 96 *American Journal of International Law* (2002) 291.

findings, and acting as a mechanism for ensuring public participation of persons potentially affected.²³⁵

In addition to being included in international law instruments and European Community directives,²³⁶ the principle of EIA is utilised extensively in soft law declarations. The World Charter for Nature (WCN) targets activities on two levels – those likely to pose a significant risk to nature must be preceded by an exhaustive examination, the outcome of which may prohibit the activity, whilst activities which may disturb nature should be preceded by an assessment so as to minimise potential adverse effects.²³⁷ The requirement to take EIA findings into consideration was however, not included in the politically negotiated Rio Declaration,²³⁸ which simply recognises EIA as a national instrument to be undertaken where proposed activities are likely to have a significant adverse impact on the environment.²³⁹ Finally, the EIA principle appears frequently throughout Agenda 21 – the designated plan of action for the Rio Declaration.²⁴⁰ The integration of the EIA procedure into these non-binding declarations reflects the increasing acquiescence of states in the adoption of environmental evaluation procedures, where development activities pose a potential risk to the natural environment. However, the EIA procedure was

²³⁵ Sands, note 11, p. 799. Also see in general, N. Robinson 'International Trends in Environmental Impact Assessment' 19 *Boston College Environmental Affairs Law Review* (1991) 591.

²³⁶ E.g. 1982 UNCLOS; 1991 Espoo Convention; 1991 Protocol on Environmental Protection to the Antarctic Treaty; 1985 EC Environmental Assessment Directive.

²³⁷ World Charter for Nature, principles 11(b) and (c).

²³⁸ The Rio Declaration is a political document negotiated by states attending the 1992 Rio Earth Summit, whilst the WCN was concluded by an international group of experts in collaboration with the IUCN.

²³⁹ 1992 Rio Declaration, principle 17.

²⁴⁰ E.g. Agenda 21, paragraphs 7.41(b), 8.4, 8.5(b), 9.12(b), 10.8(b), 13.17(a).

taken one step further in 1987 when UNEP concluded specific global Goals and Principles of Environmental Impact Assessment.²⁴¹ These Goals represent a general approach 'to be further refined when fulfilling EIA tasks at the national, regional and international levels'.²⁴² Whilst the principles are non-binding and of a generally descriptive nature, the UNEP Goals represent one of the first global precedents to address in specific detail EIA procedures for ensuring environmentally sustainable development. Moreover, the UNEP Goals have been considered by the ICJ, where, in his dissenting opinion on the Nuclear Tests case, Judge Weeramantry stated that '... [EIA] is gathering strength and international acceptance, and has reached the level of general recognition at which this Court should take notice of it.'²⁴³ In determining the role and status of EIA in international law, Weeramantry provides an encouraging indication that the procedure is edging towards international acceptance and, accordingly, potential customary law status. Further encouragement and expansion of the procedure is provided in a subsequent ICJ decision where, again, Vice-President Weeramantry concludes that '... [EIA] means not merely an assessment prior to the commencement of the project, but a continuing assessment and evaluation as long as the project is in operation'.²⁴⁴ Judicial support for the principle of EIA has been supplemented by academic writers who have viewed EIA as '...so well established in national practice that it might be regarded as a general principle of law or

²⁴¹ UNGA res. 42/184 (1987).

²⁴² 1987 UNEP Goals and Principles of Environmental Impact Assessment, preamble.

²⁴³ Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgement of 20 December 1974 in the Nuclear Tests case (New Zealand v France) (1995) ICJ Reports 288 at 344.

²⁴⁴ Gabcikovo-Nagymaros Project (Hungary v Slovakia) (1997) ICJ Reports 7.

even a requirement of customary law for states to conduct an EIA...'.²⁴⁵

Thus, as a procedural element, EIA offers one of the most tangible and widely accepted characteristics of sustainable tourism.

Environmental Impact Assessment as a Procedural Technique for Sustainable Tourism

The tourism industry relies to a great extent on development activities. Infrastructure, transportation, and visitor attractions all require a certain level of development in order to facilitate tourist demands. Thus, there is a need to ensure that the development of these tourism activities does not have a deleterious effect on the surrounding natural environment and, as illustrated above, one such mechanism for pre-empting development problems is the procedure of EIA. Whilst impact assessments are undertaken in respect of many tourism development projects, there are two specific mechanisms which are of particular interest – the policy contained under the Convention on EIA in a Transboundary Context and environmental assessment mechanisms within the World Bank institutions.

The 1991 Convention on EIA in a Transboundary Context (Espoo Convention) specifically defines the EIA process as 'a national procedure for evaluating the likely impact of a proposed activity on the environment',²⁴⁶ building on earlier international attempts to address the

²⁴⁵ Birnie & Boyle, note 14, p. 131. Also see Sands, note 11, p. 824.

²⁴⁶ Espoo Convention (30 ILM 802), article 1(vi). For further information see the website <<http://www.unece.org/env/eia/>>.

specific mechanisms of EIA.²⁴⁷ The Espoo Convention was adopted within the United Nations Economic Commission for Europe (UNECE), and despite parties to the Convention primarily being located within Europe and North America, participation is open to all interested UN member states.²⁴⁸ Parties to the Convention are obliged to take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities.²⁴⁹ The scope is therefore restricted to a number of *specified* proposed activities likely to cause a significant adverse *transboundary impact*, being subject to a decision of a *competent authority*. These three elements of the EIA procedure under Espoo define the parameters within which EIA operates, but also highlight limitations in the Treaty's objective. First, EIA is required only in respect of projects specified in Appendix I of the Convention which are likely to cause significant adverse transboundary impact, with the assessment of any activities not included on this list being discretionary.²⁵⁰ Although the specified activities are restricted to industrial, energy, and transport projects, a number of these may be directly applicable to the tourism industry, such as the construction of motorways, express roads, railway lines, airports, inland waterways, and ports.²⁵¹ However, the Espoo Convention imposes no specific obligation on state

²⁴⁷ E.g. EEC Council Directive 85/337 on the assessment of the effects of certain public and private projects on the environment.

²⁴⁸ See Espoo Convention, article 16 and the UNECE website <http://www.unece.org/oes/eccintro.htm>.

²⁴⁹ Espoo Convention, article 2(1).

²⁵⁰ Espoo Convention, articles 2(3) and (5). Note that an activity might escape EIA obligations even where it appears in the Appendix to the Convention, but is not likely to cause a significant adverse transboundary impact.

²⁵¹ Espoo Convention, appendix I (7) and (9). Note Paragraphs 10 (waste disposal installations), 11 (dams and reservoirs) and 17 (deforestation) may also be applicable to the tourism industry.

parties to ensure that an EIA is undertaken in respect of activities associated with tourism development generally. This remains a matter of discretion. The second element of EIA under the Espoo regime is that an activity must be likely to cause a 'significant adverse transboundary impact.' This fundamental requirement reiterates the principle of state sovereignty by reaffirming that states have the right to exploit their own resources so long as there is no transboundary impact.²⁵² This has significant implications for the tourism industry as development activities lacking transboundary impact escape the environmental assessment regime. Finally, a proposed activity must be subject to the decision of a competent authority, understood to mean the national authority designated for performing the tasks covered in the Espoo Convention.²⁵³ Closely associated with this requirement are the procedural responsibilities in relation to public participation, the details of which will be discussed in the next section.

The Espoo Convention has now been supplemented by a Protocol on Strategic Environmental Assessment (SEA Protocol).²⁵⁴ In contrast to the Espoo Convention, the SEA Protocol is not restricted to transboundary situations, instead exhibiting a more comprehensive approach to impact assessment. The process of strategic environmental assessment (SEA) is required for a number of specified plans and programmes likely to cause

²⁵² As laid out in principle 21 of the 1972 Stockholm Declaration.

²⁵³ Espoo Convention, article I(v) and (ix).

²⁵⁴ The Protocol was adopted in May 2003 during the Ministerial 'Environment for Europe' Conference in Kiev, Ukraine, and is open to all UN members. See the UNECE website <<http://www.unece.org/env/eia/>>.

significant environmental effects.²⁵⁵ As such, the three elements of EIA existing within the Espoo Convention can be similarly identified within the SEA process, albeit with minor differences. First, the number of projects subject to SEA is extensive in comparison to those specified under the Espoo Convention. A SEA must be carried out in relation to a near exhaustive list of plans and programmes, a number of which relate specifically to tourism activities.²⁵⁶ However, unlike the Espoo Convention, where an EIA is undertaken as part of the decision-making process, a SEA must be incorporated in the 'plans and programmes' required either by legislative, regulatory or administrative provisions, or prepared (and/or adopted) by an authority, parliament, or government.²⁵⁷ Thus, in addition to an assessment of specific projects, a SEA may also be carried out in respect of policy and legislation development processes resulting in the Protocol's assessment procedure offering extensive potential to impact on activities associated with tourism development. Finally, the requirement for a transboundary impact established under the Espoo Convention does not apply to the SEA Protocol – instead activities must prove likely to have a 'significant environmental, including health, effect'.²⁵⁸ This term is widely defined by the Protocol to encompass virtually any effect on the environment, including human health.²⁵⁹ The

²⁵⁵ SEA Protocol, article 4(1).

²⁵⁶ A SEA must be carried out for plans and programmes which (i) are prepared for *inter alia* tourism; (ii) set the framework for future development consent for projects such as the construction of motorways, railway lines, airports and ports; and (iii) includes projects relating to *inter alia* ski lifts, holiday villages and hotel complexes, marinas, and theme parks which require an EIA under national legislation: article 4(2) and Annexes I and II SEA Protocol.

²⁵⁷ SEA Protocol, article 2(5).

²⁵⁸ SEA Protocol, article 4.

²⁵⁹ The inclusion of 'human health' as an environmental effect reflects the involvement of the World Health Organisation in the negotiations of the Protocol and political

lack of a requirement for transboundary impact significantly increases the potential applicability of the Protocol and thus its use as a mechanism for ensuring an environmental assessment of activities within the tourism industry. The SEA Protocol to the Espoo Convention offers wider applicability and a more comprehensive approach to environmental impact assessment, especially in respect of tourism development activities. The inclusion of specific tourism activities and the more general requirement for the assessment of tourism plans and programmes means the EIA process is becoming an increasingly wide-reaching and effective procedure for contributing to environmentally sustainable tourism.

A second international mechanism utilising EIA procedure for the benefit of tourism development can be found within the World Bank organisation. The World Bank Group is a global lending institution providing development assistance in order to improve living standards and eliminate poverty.²⁶⁰ Of the five institutions comprising the World Bank Group,²⁶¹ the most significant for the purpose of the current discussion are the

commitments made under the 1999 London Ministerial Conference on Environment and Health. See the Preamble to the SEA Protocol.

²⁶⁰ For a general discussion on the World Bank, see e.g. A.Kiss, D.Shelton and K.Ishibashi (eds.) *Economic Globalisation and Compliance with International Environmental Agreements* (The Hague: Kluwer Law International, 2003) ch. 10; A.Qureshi *International Economic Law* (London: Sweet & Maxwell, 1999) ch. 15; I.Shihata 'The World Bank's Contribution to the Development of International Environmental Law' in G.Hafner, G.Loibl, A.Rest et al (eds.) *Liber Amicorum Professor Seidl-Hohenveldern – In Honour of His 80th Birthday* (The Netherlands: Kluwer Law International, 1998); G.Loibl 'The World Bank Group and Sustainable Development' in F.Weiss, E.Denters, and P.de Waart (eds.) *International Economic Law with a Human Face* (London: Kluwer Law International, 1998); and the website of the World Bank at <<http://www.worldbank.org/>>.

²⁶¹ The World Bank Group comprises the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID). See the World Bank website <<http://www.worldbank.org/>>.

International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA).²⁶²

The purpose of the IFC is the provision of loan and equity financing to private sector projects in developing countries²⁶³ and thus it operates by offering an array of financial products for investment in projects that are profitable for investors and benefit the local economy.²⁶⁴ To qualify for IFC financing, a project must meet a number of criteria, one of which is the satisfaction of IFC environmental and social standards, as well as those of the host country.²⁶⁵ Existing within the framework of the IFC is an 'environment and social development department' designed to ensure that IFC financed projects are environmentally and socially sustainable.²⁶⁶ The Department follows the specified IFC project cycle in order to conduct an environmental and social review of prospective projects, ensuring that they comply with applicable policies and guidelines. Whilst there are a number of specific policies targeting different project types,²⁶⁷ all projects proposed

²⁶² These two institutions undertake operations that are most applicable to the tourism industry.

²⁶³ The stated purpose of the IFC is to 'further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas, thus supplementing the activities of the IBRD' – see IFC Articles of Agreement, article 1, as amended at 28 April 1993. See the IFC website <<http://www.ifc.org/about/articles/articles.html>>.

²⁶⁴ The financial products available under the IFC are: Loans for IFC's own account (A-loans); Equity Finance; Quasi-Equity Finance (C-loans); Syndicated Loans (B-loans); Risk Management Products; Partial Credit Guarantees; and Intermediary Finance. For further details see the IFC website <<http://www.ifc.org/proserv/products/basics/basics.html>>.

²⁶⁵ Other eligibility criteria state that the project must (i) be located in a developing country which is a member of the IFC, (ii) be in the private sector, (iii) be technically sound, (iv) have good prospects of being profitable, and (v) benefit the local economy. See the IFC website <<http://www.ifc.org/proserv/apply/application/application.html>>.

²⁶⁶ See the IFC's Environment and Social Development Department website <<http://www.ifc.org/enviro/>>.

²⁶⁷ Operational policies exist for projects in relation to natural habitats (OP4.04), forestry (OP4.36), pest management (OP4.09), safety of dams (OP4.37), international waterways

for IFC funding require an environmental assessment (EA) to ensure they are environmentally sound and sustainable.²⁶⁸ The relevant Operational Policy describes a particularly broad scope in respect of what aspects are to be taken into account in an EA, including the natural environment, human health and safety, social aspects, and transboundary and global environmental aspects.²⁶⁹ The content of an EA is contingent upon classification of the specific project into one of four categories, the screening and classification of which is undertaken by the IFC based on the 'type, location, sensitivity, and scale of the project and the nature and magnitude of its potential environmental impacts'.²⁷⁰ Depending on the nature and classification of a project, the EA requirement may include instruments such as an EIA, an environmental audit, a hazard or risk assessment, and an environmental action plan.²⁷¹ The IFC has contributed finance to numerous projects identified as 'accommodation and tourism services' with the majority of those being classified as Category B projects.²⁷² Whilst an EIA is not an explicit requisite for Category B projects, the scope of EA should at a minimum examine the project's potential negative and positive environmental impacts and recommend measures needed to prevent, minimise, mitigate, or compensate for adverse impacts and improve environmental performance.²⁷³ Accordingly, many of the elements comprising the EIA process are required, albeit not expressed

(OP7.50), indigenous peoples (OP4.20), involuntary resettlement (OP4.30), cultural property (OPN1.03), and child labour (policy statement).

²⁶⁸ IFC Operational Policy 4.01 on Environmental Assessment, paragraph 1.

²⁶⁹ *Ibid.*, paragraph 3.

²⁷⁰ *Ibid.*, paragraph 8.

²⁷¹ *Ibid.*, paragraph 7.

²⁷² The projects financed by the IFC can be searched on the IFC website <<http://www.ifc.org/projects/>>.

²⁷³ IFC, note 268, paragraph 8(b).

in such a definitive manner. Moreover, an EA must include public participation by way of consultation (and take public views into account)²⁷⁴ and provision is made for the review of compliance throughout project implementation.²⁷⁵

One potential criticism of the EA process under the IFC's Operational Policy is in respect of the classification of projects. Whilst it remains the responsibility of the project sponsor to carry out the EA, the classification of projects – which establishes the level of EA required – is undertaken by the IFC.²⁷⁶ However, very few projects are classified as Category A, which imposes stricter requirements for the provision of finance. Instead, the majority of projects financed by the IFC are classified as Category B, with those in the accommodation and tourism services sector proving no exception.²⁷⁷ Accordingly, the classification procedure undertaken by the IFC appears to accord preference to less stringent compliance criteria in respect of environmental assessment, to the potential detriment of environmental and social considerations.

The second institution of the World Bank group to impact on tourism development by way of EIA is the Multilateral Investment Guarantee Agency (MIGA). The objective of the MIGA is '...to encourage the flow

²⁷⁴ *Ibid.*, paragraphs 12 & 13.

²⁷⁵ *Ibid.*, paragraph 18.

²⁷⁶ *Ibid.*, paragraph 8. The 'project sponsor' is the investor or project proponent or borrower, as the case may be, requesting IFC financing for a proposed project. See the IFC website glossary <http://www.ifc.org/enviro/EnvSoc/Review_Procedure_Main/Review_Procedure/Glossary_of_Terms/glossary.htm>.

of investments for productive purposes among member countries, and in particular to developing member countries...'.²⁷⁸ This objective is served, first, by providing non-commercial guarantees to project investors in developing member countries and, secondly, by advising developing member countries on how to improve their ability to attract foreign investment. Thus, a guarantee issued by MIGA acts to facilitate private investment in developing countries by providing additional incentive and security for prospective investors. This operates in a similar way to IFC loans, whereby private investment into developing countries is encouraged in a number of sectors, including the tourism industry, which predominantly relies upon financial injection from private investors.²⁷⁹ However, in a similar way to the IFC, applicants for MIGA products must satisfy specific environmental and social review procedures, including EIA.²⁸⁰ The environment assessment policy for MIGA echoes the provisions contained in the IFC's equivalent policy document, illustrating the standardised approach to EA adopted by the World Bank. Both the IFC and MIGA play an intrinsic role in tourism development by providing financial resources and security for private investors undertaking projects in developing countries. The provision of financial products and services offered by these World Bank institutions is conditional upon the

²⁷⁷ A comparatively small number of projects are identified at Category A, compared to Category B. See the website of the IFC for a list of the latest projects and their categorisation at <<http://www.ifc.org/>>.

²⁷⁸ Convention Establishing the Multilateral Investment Guarantee Agency 1985, article 2. See the MIGA website <<http://www.miga.org/screens/about/convent/convent.htm>>.

²⁷⁹ The majority of tourism related projects guaranteed by MIGA relate to the construction or rehabilitation of hotels. For details of guaranteed projects see the MIGA website <<http://www.miga.org/screens/projects/projects.htm>>.

²⁸⁰ For further details on MIGA's environmental and social review procedures, and environmental assessment policy see the MIGA website <<http://www.miga.org/screens/policies/policies.htm>>.

satisfaction of certain environmental standards, most notably the completion of an environmental assessment. In the context of the World Bank group, an EIA is utilised as one specific process by which an applicant can demonstrate compliance with the broader requirement for environmental assessment (along with audits, action plans, risk assessments, and hazard assessments). Nonetheless, the characteristics making up the EIA process are largely found within the overall World Bank environmental assessment procedure, highlighting the global adoption and acceptance of the mechanism in the context of sustainable tourism.

4.3.2 Public Participation and Environmental Information:

The Procedural Requirement of Participatory Rights

As a prerequisite for achieving good governance within a society, the opportunity for democratic participation of all its members is fundamental.²⁸¹ This applies equally to the formulation of environmental law and policy, where participation in decision-making and access to information represents an important contribution in the promotion of public interests regarding the utilisation and management of a society's natural resources.²⁸² In their purest form, participatory rights are recognised as the

²⁸¹ This is endorsed in Agenda 21 where Chapter 23.2 states 'One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making'.

²⁸² For a general discussion on participatory rights in international environmental law see, J.Ebbesson 'The Notion of Public Participation in International Environmental Law' 8 *Yearbook of International Environmental Law* 1997 at 51-97; M.Fitzmaurice 'Some Reflections on Public Participation in Environmental Matters as a Human Right in International Law' 2(1) *Non-State Actors and International Law* (2002) 1-22; J.Mathieson 'Public Participation in Decision-making and Access to Justice in EC Environmental Law:

right to vote in national or local elections, thereby expressing a democratic view on the manner in which society is governed. However, for the purpose of the current discussion, participation is addressed in a micro-context whereby participatory rights are applied in respect of environmental information and decision-making, as a procedural requirement for the achievement of sustainable tourism.

Public participation can take many forms, including representation on advisory panels, elective processes, public law litigation by NGOs, citizen suits, class actions, and environmental impact assessments.²⁸³ Moreover, participation in environmental matters is now not restricted exclusively to individual projects or activities, but may also encompass a form of environmental monitoring – as a result of public access to environmental information – and impact on the creation of regulatory plans and programmes. Whilst public participation can be undertaken in many different forms, there are certain elements that every participatory process should include, such as a genuine opportunity for the public to take part (and potentially influence) decision-making, an understanding of who should protect public interests, transparency and openness, access to environmental information, and the right to legal review and appeal.²⁸⁴ Participatory rights were endorsed on a global level in the 1992 Rio

the Case of Certain Plans and Programmes' 12(2) *European Environmental Law Review* (2003) 36-52; M.Fitzmaurice 'Public Participation in the North American Agreement on Environmental Cooperation' 52 *ICLQ* (2003) 333-368; S.Kravchenko 'Effective Public Participation in the Preparation of Policies and Legislation' 32(5) *Environmental Policy and Law* (2002) 204-208; A.Kiss 'Environmental Information and Public Participation in Decision-making' in A.Kiss, D.Shelton and K.Ishibashi (eds.) *Economic Globalisation and Compliance with International Environmental Agreements* (London: Kluwer, 2003).

²⁸³ J.Ebbesson 'The Notion of Public Participation in International Environmental Law' 8 *Yearbook of International Environmental Law* 1997, 51 at 58.

Declaration, where states agreed that '[e]nvironmental issues are best handled with the participation of all concerned citizens ... at the national level, each individual shall have appropriate access to information concerning the environment ... and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available...'.²⁸⁵

Traditionally, participants were only afforded standing where a private or direct interest could be identified – participation was not justified for the exercising of general public interests or concerns.²⁸⁶ However, following an increasing acceptance of participatory rights such as public participation and access to environmental information, the involvement of public bodies, citizens and NGOs is now acceptable in an increasing number of situations.²⁸⁷ This is especially relevant in the environmental context, where individuals or organisations can now take action in certain circumstances with respect to the natural environment without having to prove that they may be directly affected by certain actions (or inactions).²⁸⁸ Nonetheless, the distinction between private and public interests does remain in some legal jurisdictions as an important means of establishing the requisite level of public participation for particular situations.

²⁸⁴ *Ibid.*, p. 59.

²⁸⁵ 1992 Rio Declaration, principle 10.

²⁸⁶ *Locus standi* largely depends on participation and the nature of the claim. For example, a pressure group such as Greenpeace may be awarded *locus standi* for a procedural claim (e.g. *ultra vires*), but not in tort where compensation is sought (especially in relation to environmental damage).

²⁸⁷ Ebbesson, note 283, p. 56.

²⁸⁸ See for example the Aarhus Convention, as discussed *infra*.

Finally, participatory rights are an important consideration in the debate regarding the human right to a clean environment.²⁸⁹ In addition to many of the established basic human rights,²⁹⁰ it has been suggested that there exists an independent 'environmental right' or a human right to a clean environment.²⁹¹ Integral to this so-called 'third generation' environmental right is the notion of participatory rights, to be employed in respect of environmental decision-making and accessibility of information, occurring in both international environmental law and human rights procedures. This issue will be explored in further detail below, when environmental rights are discussed in relation to their relationship and influence on the tourism industry.

Including the Public in Sustainable Tourism Development

The principles of access to environmental information and public participation in decision-making are valuable instruments for use within the tourism sector for many of the same reasons that the environmental impact assessment procedure has been widely adopted.²⁹² However, whilst such participatory rights may be identified as elements of the EIA process, they in fact represent independent procedures under the 1998 Convention on Access to Information, Public Participation in Decision-making and Access

²⁸⁹ For an overview of this topic, see Fitzmaurice (2002), note 282, p. 1-22.

²⁹⁰ For example, rights established under the 1948 Universal Declaration of Human Rights, 1966 International Covenant on Civil and Political Rights, and 1966 International Covenant on Economic Social and Cultural Rights.

²⁹¹ See the Ksentini Report on Human Rights and the Environment UN Doc. E/CN.4/Sub.2/1994/9.

²⁹² See 4.3.1 regarding the integration of EIA into the tourism industry.

to Justice in Environmental Matters (Aarhus Convention).²⁹³ The Convention has achieved global significance, being recognised as a development in the area of environmental democracy by stressing the need for citizen participation and access to information in respect of the environment.²⁹⁴ The Aarhus Convention is based on the three participatory pillars of access to information, public participation, and access to justice.²⁹⁵ It is the first of these two pillars that will be discussed in respect of their application to activities in the tourism industry.²⁹⁶

(i) *Access to Environmental Information*

The right of the public to access environmental information is established in the Convention, which requires state parties to take the necessary measures (legislative, regulatory, or otherwise) to ensure that this right is implemented into the national framework.²⁹⁷ In such a situation, the wide-reaching provisions of the Aarhus Convention allow the public (encompassing natural or legal persons, their associations, organisations, or

²⁹³ 38 ILM 517. See the website <<http://www.unece.org/env/pp/>>.

²⁹⁴ Secretary-General of the United Nations, Kofi Annan stated '[a]lthough regional in scope, the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizen's participation in environmental issues and for access to information on the environment held by public authorities. As such it is the most ambitious venture in the area of 'environmental democracy' so far undertaken under the auspices of the United Nations.' See the website <<http://www.unece.org/env/pp/welcome.html>>.

²⁹⁵ For a general discussion on the Aarhus Convention and these three pillars, see M. Lee and C. Abbot 'The Usual Suspects? Public Participation Under the Aarhus Convention' 66 *MLR* (2003) 80-108; K. Getliffe 'Proceduralisation and the Aarhus Convention: Does Increased Participation in the Decision-making Process Lead to More Effective EU Environmental Law?' 4 *Environmental Law Review* (2002) 101-116; J. Jendroska and S. Stec 'The Aarhus Convention: Towards a New Era in Environmental Democracy' 9(3) *Environmental Liability* (2001) 140-151.

²⁹⁶ Whilst access to justice is a vital aspect of international environmental law, it is considered that access to information and public participation are of more relevance to the achievement of sustainable tourism.

²⁹⁷ Access to information is set out in Articles 4 and 5 of the Aarhus Convention.

groups) to make a request for environmental information,²⁹⁸ without an interest having to be stated. However, the obligation on parties to provide environmental information to the public is subject to a number of broad exclusions, including situations where the request for information is unreasonable or too general, or if the public authority does not hold the information requested.²⁹⁹ In addition to the public being able to make a request for specific environmental information, the Convention also obliges parties to ensure public authorities are collecting and disseminating environmental information on a more general and accessible level.³⁰⁰

The right of access to environmental information under the Aarhus Convention has recently been supplemented with a Protocol on Pollutant Release and Transfer Registers (PRTR Protocol).³⁰¹ The Protocol requires companies who either release certain pollutants into the environment, or transfer pollutants to other companies, to make an annual report to the national authority detailing the release or transfer of pollutants.³⁰² These details are then placed on a publicly accessible Pollutant Release and Transfer Register (PRTR) with the objective of regulating information on pollution – instead of pollution itself – in the hope of encouraging companies to reduce pollution levels, rather than be recognised among

²⁹⁸ Article 2(3)(a) to (c) of the Aarhus Convention defines 'environmental information' as including information on the state of elements of the environment (such as air, water, soil, landscape, natural sites and biological diversity), factors, activities or measures affecting, or likely to affect, the environment (such as energy and noise, or policies and legislation), and the state of human health and safety.

²⁹⁹ Aarhus Convention, articles 4(3) and 4(4).

³⁰⁰ Aarhus Convention, article 5.

³⁰¹ The Protocol was adopted during May 2003 at the Fifth Ministerial 'Environment for Europe' Conference, in Kiev, Ukraine. The protocol is open to accession by any state that is a member of the United Nations. See the website <<http://www.unece.org/env/pp/>>.

³⁰² PRTR Protocol, article 7.

industry's biggest polluters.³⁰³ The scope of the PRTR Register covers both specified *activities* (including those in the energy, mineral, chemical, metal, paper and wood production and processing, waste management, and intensive livestock industries) and *pollutants* that pose the most significant threat to the environment and human health, including greenhouse gases, acid rain pollutants, heavy metals, and carcinogenic chemicals.³⁰⁴

The right to access environmental information has significant consequences for the tourism industry. As parties to the Aarhus Convention must implement measures to ensure a right to environmental information and, moreover, no link or specific interest needs to be established between the public and the request for information, anyone could seek information on tourism activities (or tourism development) where there is deemed to be a potential environmental impact. Access to environmental information is an important mechanism for the continual monitoring and critique of tourism activities where the opportunity for public participation via an EIA procedure has either elapsed, or was restricted to those members of the public directly effected. Upon entry into force, the PRTR Protocol will offer an important way for companies involved in tourism development to be monitored by the public. By establishing an easily accessible public register, companies involved in tourism can be monitored and assessed to ensure that any development

³⁰³ Note there are some restrictive situations where information held on the register can be kept confidentially where public disclosure would adversely affect, for example, international relations, national security, the course of justice, information with an economic interest, intellectual property rights, and personal data, see PRTR Protocol, article 12.

³⁰⁴ PRTR Protocol, article 6 and Annexes I and II.

activities are undertaken in a sustainable manner by avoiding the transfer or release of pollutants posing a significant threat to the environment.

(ii) Public Participation in Decision-making

The right to public participation in environmental decision-making is the second pillar of the Aarhus Convention to be explored here, given its influence within the tourism industry. Public participation is applied more extensively throughout the Convention, not being subject to the same number of exclusions as the right of access to information. The Aarhus Convention establishes a right for the public to participate in three situations, namely for decisions on specific activities, for plans, programmes and policies relating to the environment, and for the preparation of executive regulations and/or generally applicable, legally binding normative instruments.³⁰⁵ In relation to the participatory requirement for specific activities, public participation is applicable in respect of the proposed activities listed in Annex I or any other proposed activities deemed likely to have a significant effect on the environment.³⁰⁶ In addition to many other general development activities, Annex I includes proposals for activities such as the construction of motorways, express roads, railway lines, airports, inland waterways, and ports – all of which are of direct relevance to the development of the tourism industry. The public concerned (in this case the ‘public’ must be affected, or likely to be affected by the decision) must be notified of the proposal, allowed

³⁰⁵ Aarhus Convention, articles 6, 7 and 8 respectively.

³⁰⁶ Aarhus Convention, article 6(1).

sufficient time to submit a response, and have that response taken into account by the decision-makers.³⁰⁷

The next situation where the Convention prescribes a right for public participation is during the preparation of plans and programmes relating to the environment. This creates a weaker obligation than that described above, as parties, to the extent appropriate, 'shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.'³⁰⁸ Finally, each party must strive to promote effective public participation during the preparation by public authorities of executive regulations and other generally applicable legally binding rules which may have a significant effect on the environment.³⁰⁹ These two aspects of public participation established under the Aarhus Convention offer much in the way of potential should parties choose to adopt the procedures. However, due to the very general nature of these obligations, it is unlikely that parties will implement the participatory provisions in such a way as to maximise their effectiveness.

The involvement of the public in the development and operation of tourism activities is of procedural importance. Although similar to the public participation requirement of an environmental impact assessment undertaken in respect of a tourism activity, the independent right to public participation is applicable to activities not requiring an EIA, but still necessitating permission from a public authority. Accordingly, the right to

³⁰⁷ Aarhus Convention, article 6.

public participation is potentially applicable to a greater number of activities, in addition to offering a more comprehensive procedure for participation. This applies equally to tourism development. Rationales such as considering taxpaying citizens as economic partners in tourism development, the avoidance of problems and mistakes for investors in the tourism sector as a result of public involvement, and the recognition of a moral obligation to consult members of the public who have traditionally utilised natural resources, have all been proffered as legitimate justifications for the promotion of public participation in tourism development.³¹⁰ Nevertheless, the most common (and least challenged) rationale for the participation process rests on the notion of procedural legitimacy and the promotion of environmental democracy.

As is evident from the discussion above, the Aarhus Convention significantly contributes to the development of participatory rights. However, perhaps the most novel way in which the Convention adds to the promotion of participation is by acknowledging the existence of a right to a clean environment.³¹¹ The proposition that there exists a human right to a clean environment has received much attention over recent years with the notion of 'environmental rights' gaining considerable international

³⁰⁸ Aarhus Convention, article 7.

³⁰⁹ Aarhus Convention, article 8.

³¹⁰ See the address 'Benefits of Public Participation in the Tourism Planning Process' by Kamau Akili (Vice-President of Environment TOBAGO), given at the Caribbean Regional Training Course on Environmentally Sound Tourist Facility Design and Development, May 1998. See the 'Environment TOBAGO' website <<http://www.scsoft.de/et/et2.nsf/KAP2View/F22C26C3EC63EAB0C125661E007B951B?OpenDocument>>.

³¹¹ Article 1 of the Aarhus Convention provides that it is "...the right of every person of present and future generations to live in an environment adequate to his or her health and well-being".

momentum.³¹² Environmental rights can largely be identified as falling into one of two categories; environmental substantive rights, or environmental procedural rights. Substantive rights include such things as the right to life, the right to health, and the right to an adequate standard of living, some of which have been applied in relation to environmental issues.³¹³ However, it is procedural rights upon which this discussion will focus, in order to determine the manner in which environmental rights have influenced procedural requirements, especially in respect of sustainable tourism.

A study of human rights and the environment was undertaken by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, concluding in the publication of the Final Report in 1994 (the Ksentini Report).³¹⁴ In recognising the intrinsic link between human rights, the environment, and development, the Special Rapporteur outlines the evolutionary relationship between these interests and concludes that international law now recognises the inextricable link between human rights and environmental protection.³¹⁵ Participatory democracy in the

³¹² For a discussion on a human right to the environment and environmental rights, see: A.Boyle and M.Anderson *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press, 1996); S.Atapattu 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law' 16 *Tulane Environmental Law Journal* (2002) 65-126; D.Shelton 'Environmental Rights' in P.Alston (ed.) *Peoples' Rights* (Oxford: OUP, 2001) 185-258; P.Pevato 'A Right to Environment in International Law: Current Status and Future Outlook' 8(3) *RECIEL* (1999) 309-321; P.Sands 'Human Rights and International Environmental Law' *European Human Rights Law Review* (1996) 597-618.

³¹³ These and other substantive environmental rights can be found in the 1966 International Covenants on Economic, Social and Cultural Rights (ICESCR), and Civil and Political Rights (ICCPR).

³¹⁴ The Final Report was prepared by Special Rapporteur, Mrs Fatma Zohra Ksentini. UN Doc. E/CN.4/Sub.2/1994/9.

³¹⁵ E.g. Stockholm Declaration, principle 1; World Charter for Nature, principle 23; Rio Declaration, principle 10; African Charter on Human and Peoples' Rights, article 24; San

context of the environment is recognised as providing substance to the concept of sustainable development.³¹⁶ In particular, participation must be considered meaningful – a question to be determined by reference to the quality of participation and timeliness. Annexed to the Ksentini Report are the Draft Principles on Human Rights and the Environment, intended to provide environmental rights with an explicit and autonomous character. Of procedural significance are the principles set out in Part III, which specifically provide for the right to access environmental information, obtain environmental and human rights education, and enjoy active, free and meaningful participation in environmental and developmental planning and decision-making.³¹⁷ Whilst the specific character of these principles does not add anything particularly innovative to the common understanding of participatory rights, their inclusion further augments the importance attributed to such procedural requirements, especially in the context of human rights. Moreover, by approaching participatory obligations through the filter of human rights, it not only adds another dimension from which participation and access to information may be approached, it also provides further credibility and more extensive application to the procedures.

In addition to the various claims for environmental rights scattered throughout international legal instruments, there are a number of state constitutions which also include a specific right to a healthy or clean

Salvador Protocol to the American Convention on Human Rights, article 11; Convention on the Rights of the Child, article 29. Note that some commentators have challenged the Special Rapporteur's suggestion that such a relationship accordingly indicates that international law recognises a right to a healthy environment. See Atapattu, note 312, p. 82.

³¹⁶ Ksentini Report, paragraph 70.

environment, thereby creating a form of 'constitutional right' in respect of the natural environment.³¹⁸ The benefit of introducing environmental protection measures at a constitutional level is reflected in the importance attached to 'constitutional rights', in this case elevating environmental rights to binding legal obligations similar to other fundamental rights guaranteed in a country's constitution. Moreover, constitutional provisions can expressly enable legislatures to enact environmental laws to implement ... [environmental] protection ... [measures].³¹⁹ There are obvious benefits for the regulation of tourism activities – and the development of the sustainable tourism concept – in states that promote a constitutional environmental right. By raising the status of environmental considerations and providing increasing opportunity for the public to hold the state to account, constitutional rights contribute to the regulatory developments within a country, and also indicate to the international community how a state values and implements environmental considerations.

Public participation and access to information are important procedural techniques for implementation within the tourism industry for the purpose of achieving sustainable tourism. Unlike the EIA procedure – which applies only to specified activities – the right of public participation should be integrated in all environmental decision-making. Similarly, the promotion of access to information provides for the indirect monitoring

³¹⁷ Draft Principles on Human Rights and the Environment, principles 15, 17 and 18.

³¹⁸ See generally C.Bruch, W.Coker and C.Van Arsdale 'Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa' *Columbia Journal of Environmental Law* (2001) 131; A.Kiss and D.Shelton *International Environmental Law* (New York: Transnational Publishers, 1994 3rd edition) ch.1

³¹⁹ *Ibid.* Bruch, Coker and Van Arsdale, p.150.

and assessment of activities. Nevertheless, tourism provides a unique example of a situation where public involvement may be criticised as a result of the categorisation of what constitutes the 'public'. In respect of participatory rights the public is often described so as to include groups such as NGOs, government, and industry representatives. Such a 'tri-partite relationship' should be approached with caution, so as to ensure a legitimate level of public participation is in reality being achieved.³²⁰ This is especially relevant in an industry such as tourism where participation by national governments, those in the tourism industry, and organisations such as the WTO may represent significant economic interests. Accordingly, whilst participatory rights are an invaluable procedural mechanism for contributing towards sustainable tourism development, the actual section of the 'public' participating must be truly reflective of general public interests.

4.4 Conclusion

This chapter has sought to establish a profile of sustainable tourism, highlighting and isolating the different components of the principle. Based on the framework of sustainable development, each of the individual components have been examined in order to reach a conclusion as to the legal obligations surrounding the concept of sustainable tourism.

First, the substantive characteristics of equitable utilisation, sustainable use and integration are identified and examined in order to determine whether

³²⁰ Lee and Abbot, note 295, p. 87.

these same characteristics can also be seen to define the principle of sustainable tourism.

The first component required in order to establish the principle of sustainable tourism is some form of equitable utilisation. Primarily this involves tourism being undertaken in such a manner that present-day tourists, communities and operators may benefit from the environment's natural resources, without inhibiting the ability of future generations to similarly benefit from the same resources – effectively employing the principle of intergenerational equity. Furthermore, intra-generational equity should also constitute an element of sustainable tourism, whereby the use of tourism resources (such as an area like Africa's Victoria Falls), is shared equally by all participants. Arguably, however, this requirement is not as pressing as that of intergenerational equity. The adoption of intra-generational equity should ensure the equal utilisation of resources and avoid the exhaustion of resources in one area resulting in the activity relocating to another. This re-affirms the need for an international response to the tourism industry's environmental impact, ensuring the benefits and burdens of tourism are spread temporally as well as spatially. Finally, the idea of stakeholder equity (being equity between the various participants within the tourism industry) should also be integrated into the principle of sustainable tourism, although at this point in time there clearly lacks any legal significance in respect of this obligation. Thus, the concept of equitable utilisation (comprising both inter- and intra-generational equity) forms the first component of the principle of sustainable tourism.

The second substantive characteristic of sustainable tourism is the concept of sustainable (or wise) use. The rationale underlying this requirement is that standards should be established in order to restrict the exploitation of natural resources and ensure tourism development and activities are undertaken in a sustainable manner. This concept requires the creation of limits (in respect of, for example, tourist numbers, infrastructure development, vehicle traffic, tour operators, times of operation and so on), which are to be adopted by participants within the tourism industry, thereby ensuring the long-term sustainability of natural resources.

The last substantive characteristic is the requirement for integration. The concept of integration attempts to reconcile development and environment interests – both of which are hugely prominent in the tourism industry. This is best achieved by requiring environmental protection to be an integral aspect of the development process (rather than being considered in isolation from it), as established in the Tourism Protocol to the Alpine Convention. Therefore, the principle of sustainable tourism requires the consideration and integration of environmental issues into the tourism development activities.

Next, there are three supplementary principles that contribute to the achievement of sustainable tourism – the concepts of precaution, polluter-pays and cooperation. The principle of precaution stipulates in its strictest manifestation that where there are threats of serious or irreversible

environmental damage, lack of scientific certainty cannot be employed as a justification for postponing preventative measures. This principle has been widely adopted in international environmental law (especially in respect of marine pollution) and thus forms a requirement for the establishment of 'sustainable tourism'. Similarly, the idea that the polluter should, in principle, bear the cost of pollution is also to be endorsed. Throughout the tourism industry this concept exists in the form of user-pays fees and levies (such as park entry fees, permits etc), as well as polluter-pays charges (for example, emission tariffs) which target the specific polluting activity. The principle of sustainable tourism includes the imposition of a responsibility on polluters – be it tour operators or tourists – to make some financial contribution in respect of the environmental damage created by their activities.

Cooperation is considered a fundamental requirement for the achievement of sustainable tourism, appearing in the form of, *inter alia*, political and administrative cooperation, information exchange, scientific and technology transfer, and financial agreements. Sustainable tourism requires cooperation to take place between states, organisations, and tour operators with a view to collectively achieving environmental sustainability within the tourism industry.

Finally, two procedural techniques implement the principle of sustainable tourism in a largely practical sense. The requirement for environmental impact assessment is becoming increasingly prevalent, where the potential

environmental impacts and consequences of a development project are evaluated in order to pre-empt and avoid environmental damage. This is especially important in the tourism industry, which is responsible for extensive development. By requiring participants of the tourism industry to undertake – and adhere to the recommendations of – environmental impact assessments, the principle of sustainable tourism is being implemented into international environmental law in a practical sense. Similarly, the procedural requirements of public participation and access to environmental information further contribute to the implementation of sustainable tourism. The imposition of participatory rights ensures that the public has the right to access information and the ability to participate in environmental decision-making, thereby establishing transparency and accountability throughout the tourism industry.

Thus, based upon the framework of sustainable development, it transpires that there does exist an obligation regarding sustainable tourism within the international legal system. The different components that collectively constitute sustainable development are similarly applicable to the tourism industry and, as such, are identified as independent components of 'sustainable tourism'. Whilst it would be premature to claim that the principle of sustainable tourism creates a legally binding obligation of a general character within the international legal system, the identification of the various components within the principle allows for sustainable tourism to be attributed, at least, a legally significant role.

Conclusion

Despite being a relatively recent phenomenon, tourism has had a significant (and sometimes drastic) impact on the global natural environment. Tourists are attracted to particularly fragile environmental resources, often targeting coastal areas, alpine environments, polar regions, and species habitat. The environmental impacts of tourism activities extend to pollution, resource degradation, over-consumption, habitat destruction, and the unbalancing of ecosystems. Whilst the tourism industry impacts on a multitude of factors (for example, cultural, economic, geographic, social and so on), it is the environmental impact of tourism that has been the focus of this thesis.

Although the relationship between tourism and the environment can in some situations be amicable, it most often deteriorates into a position of conflict where environmental and development priorities are pitched against one another – with tourism-orientated development almost inevitably triumphing. In many cases, this is especially apparent in areas subject to mass tourism, where extensive development and heavily populated areas result in greater environmental degradation. Added to the general environmental problems associated with the tourism industry is the reality that environmental concern did not evolve in any type of comprehensive fashion until sometime after the popular development of tourism. As a result, the global tourism industry enjoyed a period of more than 50 years of largely unrestricted growth before environmental concern

in general became internationally prominent, whilst it is only in recent years that specific attempts have been made to reconcile environmental concern with tourism development. Thus, it is evident that tourism enjoyed an extensive period of advantage before the associated environmental problems were addressed or, indeed, even acknowledged.

The most obvious way in which the tourism industry and environmental concern have been reconciled is via the principle of 'sustainable tourism', the most widely accepted definition for which has been formulated by the World Tourism Organisation. Drawing heavily on the principle of sustainable development, the WTO interpretation requires the balancing of a number of interests – such as economic, social, aesthetic, cultural, and ecological – with the result that activities could adhere to the principle of sustainable tourism, without in fact prioritising or addressing environmental issues at all. In any event, the adoption by the WTO of a definition for 'sustainable development of tourism' (as opposed to 'sustainable tourism'), suggests environmental concerns take a subservient role to more development-based interests. A possible solution to redress this imbalance is provided by the ecotourism concept, which *prima facie*, implies a form of environmentally sustainable tourism. However, following further examination, this proposal is rejected on account of its numerous possible interpretations, as well as the manipulation which is evident in respect of the concept, undermining its value as a conservation principle, and reducing it to a means of identifying a particular market segment.

Following the recognition of environmental problems created by the tourism industry, it becomes necessary to determine the extent to which this relationship has been addressed by the international community. It is now well established that environmental problems extend beyond national boundaries and thus must be approached from an international perspective in order to be tackled effectively.¹ Furthermore, the inherently global nature of the tourism industry necessitates an international response to environmental issues. There are numerous participants within the tourism industry which could be either responsible for, or affected by, environmental degradation. The international legal system is traditionally focused on the actions of states and, in this sense, tourism can be regulated and managed via state action. However, in order for tourism to be addressed effectively, regulation needs to extend beyond state actors and reach other participants within the industry. Individuals are increasingly gaining rights and obligations within the international legal system, especially in respect of participatory rights such as access to information, participation in planning and decision making, and access to justice. Furthermore, there is also a growing recognition of individuals as the subjects of environmental responsibility, culminating in liability by way of the polluter-pays principle and civil liability regimes. Accordingly, individual tourists, small tour operators and local communities are increasingly being accorded rights and responsibilities by the international legal system.

¹ Regional and national regulation is also vital, but international coordination is essential in order for environmental problems to be successfully managed.

Multinational enterprises constitute a significant category of actor in the tourism industry, demonstrating a vast potential for environmental degradation. International law has traditionally found it problematic to regulate the actions of such entities, with compliance difficulties, the imposition of effective penalties, and their lack of international personality making regulation difficult. Environmental liability regimes noted above as being applicable for individuals, such as the polluter-pays principle and civil liability have also been employed for the regulation of MNEs. Due to the problems surrounding the implementation of environmental liability regimes for MNEs, an alternative method of 'regulation' proving increasingly effective is the imposition of political or moral commitments where the breach of (non-legally) binding commitments may carry political consequences or negative publicity.

Non-governmental organisations are another active participant within the tourism industry. Involved in many aspects of the international legal process, NGOs undertake research, draft international agreements, provide resources, monitor state activities, and ensure compliance and accountability. In this way, NGOs demonstrate an active role in the international regulation and management of tourism activities. Similarly, intergovernmental organisations provide a representative voice on tourism-related issues. Ranging from small organisations with a single themed mandate, to large bodies targeting a number of topics, international organisations are also often responsible for coordinating and monitoring

other participants within the tourism industry. Perhaps the most significant international organisation – the United Nations – has recognised the relationship between tourism and the environment, and implemented specific programmes in an attempt to redress the imbalance. These initiatives promote voluntary agreements and programmes between tourism participants, with a view to creating increased awareness and accountability.

The World Tourism Organisation has established, amongst other things, a sustainable tourism agenda implementing various initiatives for the sustainable development of tourism. Notably, the WTO has concluded a declaration on climate change and tourism, calling for further research and development to successfully manage the relationship; established the Global Code of Ethics which sets out basic principles to be implemented by a specialist compliance committee currently being developed; participated in formulating a declaration on ecotourism promoting its merits as a conservation technique; and contributed to an international network for the development of coastal destinations. The conversion of the WTO into a specialised agency of the UN will allow for tourism (and its relationship with the environment) to be accorded greater international attention and further promoted in the context of global issues. It is thus apparent that tourism's impact on the natural environment has been extensively recognised and addressed by the international community and, furthermore, that many of the participants within the tourism industry do

have important rights and responsibilities established by the international legal system.

In light of these considerations, it is necessary to examine the specific application of international environmental law to the tourism industry. There are a number of international treaties that can be considered to influence and shape the operation of the industry, with respect to environmental issues. Many treaties, whilst applying to tourism activities in a very general sense, more specifically provide an institutional framework where particular aspects of tourism have been explored in much greater detail. Marine pollution is the topic of a considerable body of regulation, much of which can be applied to the plethora of tourism activities which take place in and around the marine environment. In particular, land-based and vessel-sourced marine pollution provides numerous examples. Regulation in respect of atmospheric pollution typically targets industrial activities and the consumption of fossil fuels – both of which are fundamental to the global tourism industry. The aviation industry is responsible for a significant contribution to greenhouse gas emissions and, with no immediate prospects for a decrease in emissions or introduction of alternative technologies, aviation remains a concern for the global management of atmospheric pollution.

The impact of tourism on biological diversity occurs on many levels, affecting both individual species and their habitats. International environmental law has addressed the conservation of species and natural

ecosystems in a general sense, primarily via the Convention on Biological Diversity. Furthermore, specific species and habitats are targeted by other international conventions, with agreements regarding trade in endangered species and whaling extending their initial mandate to address associated problems created by the tourism industry. This is similarly the case in respect of habitat preservation, where treaties regulating the conservation of wetlands, world heritage sites, and the Antarctic ecosystem target the growing tourism activities developing in those areas. In this way, international environmental law can be seen to be responding to the evolving tourism industry and its consequent impact on the natural environment, albeit in a mostly *ad hoc* manner. Numerous international agreements have now clarified and developed their mandate by adopting additional recommendations and resolutions, allowing participating states to address the problems created by tourism within the institutional framework already in place. Whilst this approach by the international community is credible and makes a beneficial and worthwhile contribution to the preservation of the environment, there is significant potential for the WTO – especially in its new role as a UN specialised agency – to undertake a leadership function and facilitate the international coordination of such efforts. One way in which this might be partly achieved, is by the Organisation operating as an international clearing-house for sustainable tourism. The WTO has extensive potential in this regard, and such developments would make a significant contribution to the successful regulation of tourism activities.

Finally, the concept of sustainable tourism has been examined in order to determine whether there might exist an evolving legal obligation within international law. Many of the characteristics, principles and techniques that define and shape sustainable development within international law are also directly applicable to the concept of sustainable tourism. The principles of intergenerational and intra-generational equity offer a valuable approach for ensuring tourism resources are sustainable on both a temporal and spatial level, whilst the notion of stakeholder equity implies fairness between all participants within the tourism sector. The sustainable utilisation of tourism resources is a principle that has received much support in different aspects of international environmental law, demonstrating the successful transposition of a general international principle to the specific features of the tourism industry. Furthermore, the integration of economic and environmental considerations is particularly relevant to the tourism industry, which primarily comprises economically orientated participants and vulnerable ecosystems. In addition to these substantive characteristics, three international principles have also contributed to the definition and understanding of sustainable tourism. The adoption of the precautionary principle in situations where scientific uncertainty may lead to environmental damage has proven useful, especially in the case of marine pollution originating from tourism activities. The notion that a polluter should in principle bear the costs of pollution also shows significant potential for managing private-sector tourism activities where pollution can be attributed to the source. Moreover, the principle of cooperation is an invaluable tool in coordinating

efforts to achieve sustainable tourism. Finally, the identification of two procedural techniques for implementing these characteristics and principles conclude the legal analysis of the sustainable tourism concept. Environmental impact assessments are now widely employed in respect of the development of tourism activities, whilst public participation provides a mechanism for ensuring all those concerned or affected by tourism development are consulted and their views taken into consideration. The application of these principles and procedures to the developing tourism sector has resulted in the identification of a new international concept. Although established within the legal parameters of sustainable development, there is clearly an emerging principle of sustainable tourism which is gaining increasing momentum and international significance. The challenge now is to ensure the continuing development of the sustainable tourism concept and to strengthen its position within the international legal system. This can be achieved by increasingly wide-spread use of the concept itself, and also by focusing on the implementation of the individual rights and responsibilities identified above as constituting components of sustainable tourism. This way, in a similar fashion to sustainable development, the concept of sustainable tourism will develop and mature into an international principle acknowledged and respected by the international community as possessing legal significance.

By way of summary, there are clearly two areas with great potential for future development in respect of promoting the reconciliation of tourism activities and environmental protection. First, whilst international

environmental law has made a significant contribution to the regulation of tourism activities, this has taken place on an *ad hoc* basis and, therefore, largely lacks cohesion and consistency. However, the WTO now represents an ideal structure within which to address this problem and coordinate an international response. Accordingly, the WTO must adopt a stronger leadership position in respect of sustainable tourism and, moreover, develop its role as a centralised mechanism for coordinating international, global and regional efforts to regulate and manage tourism activities. In doing this, all participants of the tourism industry must be taken into account and included in the international legal process. Secondly, there is significant potential for the further development of the 'sustainable tourism' concept. Recognised as an emerging principle in the international legal system, there must now be a concerted effort to promote and develop both the principle itself, and also the individual components of the sustainable tourism concept.

The objective of this thesis was to redress the imbalance between environment and development concerns in respect of the tourism industry, by applying international environmental law in order to achieve environmentally sustainable tourism. A critical analysis of the current approach by the international community has revealed an acute awareness of the environmental challenges created by the tourism industry, and a growing international response aimed at rectifying such problems. There exists significant potential for further development and regulation, with much of the institutional framework now in place. As with any aspect of

international regulation, however, much depends on the political will of states and other participants in the tourism industry. To date, the international community has responded favourably to the comparatively recent acknowledgement of tourism-generated environmental degradation. In order not to jeopardise these successes, momentum must be maintained and the quest for effective regulation and management continued. In this way, it may one day be possible to achieve the elusive state of symbiosis, where both the tourism industry and the natural environment exist in a mutually harmonious relationship.

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